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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

NATIVE VILLAGE OF KIVALINA and	)	Case No. 08-cv-1138-SBA
CITY OF KIVALINA,	)	
	)	Assigned to: Hon. Sandra B. Armstrong
Plaintiffs	)	
	)	<b>UTILITY DEFENDANTS' MOTION TO</b>
vs.	)	<b>DISMISS</b>
	)	
EXXONMOBIL, CORPORATION,	)	Date: December 9, 2008
	)	Time: 1:00 p.m.
Defendants	)	Place: Courtroom 3, 3 <sup>rd</sup> Floor
	)	

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19	IPCC Working Group II, Intergovernmental Panel on Climate Change, <i>IPCC Second Assessment:</i>	
20	<i>Climate Change 1995</i> (1995), available at <a href="http://www.ipcc.ch/pdf/climate-changes-1995/ipcc-2nd-assessment/2nd-assessment-en.pdf">http://www.ipcc.ch/pdf/climate-changes-1995/ipcc-2nd-</a>	
21	<a href="http://www.ipcc.ch/pdf/climate-changes-1995/ipcc-2nd-assessment/2nd-assessment-en.pdf">assessment/2nd-assessment-en.pdf</a> .....	30
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23	Kyoto Protocol, Dec. 10, 1997, 37 I.L.M. 22 .....	6, 14
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25	Acting Administrator (Aug. 28, 2003).....	12

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that, on December 9, 2008, at 1:00 p.m. or as soon  
3 thereafter as it may be heard, in the above-entitled Court located at 1301 Clay Street, Oakland,  
4 California, before the Honorable Sandra B. Armstrong, Courtroom 3, third floor, defendants will  
5 and hereby do move this Court, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6),  
6 to dismiss with prejudice plaintiffs' claims (other than the conspiracy claim).

7 The grounds for this motion are that no court has subject matter jurisdiction over  
8 plaintiffs' claims as plaintiffs' suit raises nonjusticiable political questions and plaintiffs lack  
9 standing; and additionally that the complaint fails to state a claim upon which relief can be granted  
10 as plaintiffs lack a federal cause of action, their state law claims are preempted, they do not and  
11 cannot plead the required elements of a state-law nuisance or concert-of-action claim, and their  
12 claims (federal and state) are time-barred. This motion is based on this notice of motion, the  
13 accompanying memorandum of points of authorities, the pleadings and other papers on file in this  
14 action, and on such other argument as may be presented to the court on reply and at the time of  
15 hearing.

### 16 INTRODUCTION

17 This is the fourth lawsuit in which a group of plaintiffs has sued seeking judicial redress for  
18 injuries allegedly caused by greenhouse gas emissions and global warming. The three earlier  
19 lawsuits were all dismissed on the pleadings because, at bottom, they inescapably required federal  
20 courts to usurp the responsibilities of the political branches to decide fundamental questions  
21 concerning the nation's economy, security, and foreign relations.<sup>1</sup> Because this lawsuit is no  
22 different, it should meet the same fate.

23  
24 <sup>1</sup> See *California v. Gen. Motors Corp.*, No. 06-5755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007),  
25 *appeal pending*, No. 07-16908 (Jenkins, J., presiding); *Comer Oil v. Murphy Oil USA*, No. 1:05-cv-  
26 00436-LG-RHW (S.D. Miss. Aug. 30, 2007), *appeal pending*, No. 07-60756 (5th Cir.) (attached at  
27 Exh. B to the Declaration of Daniel P. Collins in Support of Motion of Certain Oil Company  
28 Defendants to Dismiss Plaintiffs' Complaint Pursuant to Fed. R. Civ. P. 12(b)(1), filed June 30,  
2008, and attached hereto for the Court's convenience as Exh. 1); *Connecticut v. Am. Elec. Power  
Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *appeal pending*, Nos. 05-5104-cv & 05-5119-cv (2d  
Cir.).

1 Here, plaintiffs seek to blame certain U.S. energy companies for injuries plaintiffs claim to  
2 have suffered because Arctic ice that once surrounded and protected the island they inhabit has  
3 allegedly melted as a result of global warming. Plaintiffs allege that the phenomenon of global  
4 climate change is caused by countless human activities throughout the planet. Nevertheless, they  
5 seek damages under federal common law and state nuisance law based on defendants' alleged  
6 contributions to this worldwide phenomenon. Plaintiffs' lengthy allegations, however, cannot  
7 obscure the fundamental problems with their lawsuit: This Court cannot decide the question of fault  
8 that lies at the heart of this case without making normative policy decisions that courts have neither  
9 the constitutional authority, institutional competence nor manageable standards to address. As a  
10 consequence, a series of interrelated principles mandates dismissal of this suit.

11 First, plaintiffs' claims raise nonjusticiable political questions. Because everyone on the  
12 planet emits carbon dioxide, this suit requires the Court to determine that greenhouse gas emissions  
13 beyond a certain level and by certain sources should be actionable. But, as the three other courts that  
14 have confronted global warming tort suits have recognized, courts have no meaningful or  
15 manageable standards for making such initial policy determinations. To hold that defendants' past  
16 emissions were unreasonable, and thus tortious, this Court (or a jury) would have to determine (a)  
17 the costs defendants would have incurred if they had fundamentally altered energy production in  
18 order to achieve significant greenhouse gas reductions, (b) the economic and other societal  
19 consequences that would have resulted from such costs, and (c) the risk that such reductions would  
20 have been offset by increased emissions elsewhere. The Court (or jury) would then have to  
21 determine that these societal costs and risks were outweighed by the risk of plaintiffs' alleged global  
22 warming-related injuries. The "correct" balance of such broad-gauged and multifaceted societal  
23 interests, however, is not a question of fact for a court or jury to decide. It is, instead, a fundamental  
24 policy decision of a kind clearly for non-judicial discretion—a decision for which there are no  
25 judicially manageable standards, and that the Constitution commits to the branches of government  
26 that are accountable to the American people.

27 Second, plaintiffs lack standing. They do not and cannot allege that their claimed injuries—  
28 *i.e.*, storm damage and erosion from a loss of Arctic sea ice that formerly protected their island—are



1 fairly traceable to these particular defendants. In fact, plaintiffs’ allegations contradict such a claim.  
2 According to the complaint, plaintiffs’ injuries are not attributable to the select group of companies  
3 they have sued, but to a homogeneous aggregation of countless worldwide emissions dating back  
4 decades and possibly centuries. And their injuries are in all events simply too remote from the  
5 conduct of these defendants. Indeed, the Supreme Court recently confirmed that the very types of  
6 allegations plaintiffs make here are insufficient to establish standing under the ordinary Article III  
7 requirements that apply to this suit.

8 Third, plaintiffs lack a federal cause of action. The federal common law cause of action the  
9 Supreme Court created a century ago for transborder pollution permitted *States* to seek *injunctive*  
10 *relief* for nuisances of “*simple type*”— *i.e.*, those where immediately harmful or noxious substances  
11 cause severe localized harms directly traceable to an identifiable out-of-state source. Plaintiffs  
12 cannot wedge their claims into this mold. They are not States. They seek damages, not injunctive  
13 relief. And the novel and complex nuisance they allege differs in every respect from those of  
14 “simple type.” The emissions at issue are not immediately harmful or noxious, and global warming  
15 is alleged to cause planet-wide harms, none of which is directly traceable to any source.

16 Nor can courts expand the previously recognized cause of action to encompass plaintiffs’  
17 extraordinary claims. Doing so would contravene the Supreme Court’s repeated admonitions that  
18 courts cannot use their limited federal common lawmaking powers to create private damages actions  
19 or to resolve issues of high policy. In addition, any expanded version of the federal common law  
20 cause of action that could encompass plaintiffs’ claims has been displaced. Congress has spoken  
21 directly to the subject of global warming through a series of laws that adopt a carefully calibrated  
22 mix of regulation, research, technology development incentives and multilateral negotiations.  
23 Moreover, recognition of the damages action plaintiffs seek would effectively create *de facto*  
24 emissions limits and would thus interfere with the President’s implementation of U.S. foreign policy,  
25 which seeks to use the prospect of mandatory U.S. emissions limits as a means of obtaining  
26 comparable commitments from developing countries such as China and India.

1 In addition to these fundamental defects, plaintiffs' suit is untimely. Plaintiffs have long  
 2 known of their injuries and their injuries' alleged connection to global warming. Yet they waited  
 3 years to file this suit. Accordingly, all of their claims (both federal and state) are time-barred.

4 Plaintiffs' state law claims must also be dismissed for several additional reasons. Those  
 5 claims are preempted by the same federal laws and foreign policy efforts that displace federal  
 6 common law. Moreover, plaintiffs do not and cannot allege cognizable theories of legal duty or  
 7 proximate causation, which are fatal flaws warranting dismissal on the pleadings. Their allegations  
 8 likewise state no independent concert of action claim.

9 Ultimately, plaintiffs cannot conceal the political questions their claims raise, and that they  
 10 are therefore seeking redress in the wrong forum. As three other courts have correctly recognized,  
 11 suits based on unprecedented global warming theories of liability inescapably raise a host of  
 12 fundamental political questions that courts cannot resolve using vague maxims of nuisance law:  
 13 Which of the billions of worldwide emitters of greenhouse gases can be held liable in damages for  
 14 alleged global warming-related harms? Which of the billions of people potentially affected by  
 15 global warming should have a damages remedy? Under what standards? These are questions of  
 16 high policy that, under our constitutional system, can be decided only by the political branches of  
 17 government, not the courts.

## 18 BACKGROUND

19 **1. Plaintiffs' Allegations Concerning Global Warming.** Plaintiffs are a municipality and  
 20 an Alaskan Native Village that seek damages for injuries they have allegedly sustained as a result of  
 21 global warming. They allege that carbon dioxide and other greenhouse gases trap heat in the Earth's  
 22 atmosphere, thereby "causing a change in the Earth's climate." Compl. ¶¶ 123, 132. Over an  
 23 extended period of at least a century, this trapped heat allegedly raised the temperature of the  
 24 atmosphere, *id.* ¶¶ 123, 125, 127, which, in turn, melted glaciers and ice caps, raised ocean  
 25 temperatures, and caused sea levels to rise, *id.* ¶¶ 130-131. Plaintiffs allege that increased  
 26 temperatures also caused a loss of sea ice, which leaves their island, Kivalina, more vulnerable to  
 27 waves, storm surges and erosion. *Id.* ¶ 185. The resulting damage has allegedly created an  
 28

1 unacceptable risk of flooding, which renders Kivalina uninhabitable and will require its  
 2 approximately 400 inhabitants to incur substantial relocation costs. *Id.* ¶¶ 185-186.

3       **2. The Federal Government’s Response to Global Warming.** Global warming “is not a  
 4 problem . . . that has escaped the attention of policymakers in the Executive and Legislative  
 5 Branches of our Government.” *Massachusetts v. EPA*, 127 S. Ct. 1438, 1463-64 (2007) (Roberts,  
 6 C.J., dissenting). As early as 1978, Congress established a “national climate program” to improve  
 7 understanding of global climate change through research, data collection, assessments, information  
 8 dissemination, and international cooperation. *See* National Climate Program Act of 1978, 15 U.S.C.  
 9 §§ 2901 *et seq.* In 1990, Congress enacted the Global Change Research Act, 15 U.S.C. §§ 2931-  
 10 2938, which established a 10-year research program for global climate issues, *id.* § 2932, directed  
 11 the President to establish a research program to “improve understanding of global change,” *id.*  
 12 § 2933, and provided for scientific assessments every four years that “analyze[] current trends in  
 13 global change,” *id.* § 2936(3). Two years later, Congress directed the Secretary of Energy to  
 14 conduct assessments related to greenhouse gases and report to Congress. Energy Policy Act of  
 15 1992, Pub. L. No. 102-486, § 1604, 106 Stat. 2776, 3002 (codified at 42 U.S.C. § 13384).

16       Congress has done more, however, than merely mandate research into global climate change.  
 17 In the Clean Air Act (“CAA”), Congress authorized the Environmental Protection Agency (“EPA”)  
 18 to regulate greenhouse gas emissions from new motor vehicles if it finds that they “‘endanger [the]  
 19 public health or welfare.’” *Massachusetts v. EPA*, 127 S. Ct. at 1459-60 (quoting 42 U.S.C.  
 20 § 7521(a)(1)). And the 1990 amendments to that Act require EPA “to develop, evaluate, and  
 21 demonstrate nonregulatory strategies and technologies for air pollution prevention” addressing  
 22 carbon dioxide. 42 U.S.C. § 7403(g).

23       More recently, the Energy Policy Act of 2005 called for a “national strategy to promote the  
 24 deployment and commercialization” of technologies to reduce greenhouse gas intensity. *See id.*  
 25 § 13389(c)(1). The Energy Independence and Security Act of 2007 addresses greenhouse gas  
 26 emissions by, among other things, creating a number of vehicle-emissions reduction planning and  
 27 incentive programs, requiring an assessment of carbon sequestration methods, and creating grant  
 28 programs to accelerate research and development of non-carbon emitting technologies such as solar,

1 geothermal, marine and hydrokinetic energy. *See* Pub. L. No. 110-140, §§ 101-136, 601-636, 711-  
2 714, 121 Stat. 1492, 1498-1516, 1674-88, 1710-15 (2007) (codified at 42 U.S.C. chs. 149, 152, 329).  
3 The latter statute also requires a 40% increase in automobile fuel efficiency by the year 2020, *id.*,  
4 § 102(a), 121 Stat. at 1499 (codified at 42 U.S.C. § 32902)—a standard that is the functional  
5 equivalent of an emissions standard, because “fuel economy is directly related to emissions of  
6 greenhouse gases.” *Average Fuel Economy Standards for Light Trucks Model Years 2008-2011*, 71  
7 Fed. Reg. 17566, 17659 (Apr. 6, 2006) (National Highway Transportation Safety Administration)  
8 (codified at 49 C.F.R. pts. 523, 533, 537).

9       Beyond enacting this mix of regulatory authority, fuel efficiency standards, technology  
10 incentives and research mandates, Congress has directed the executive branch to undertake  
11 multilateral negotiations to ensure that U.S. domestic measures are adopted in the context of a  
12 broader international response. In the Global Climate Protection Act of 1987, Congress directed the  
13 Secretary of State to coordinate U.S. negotiations concerning global climate change. *See* 15 U.S.C.  
14 § 2901 note; *see also id.* § 2952(a) (directing the President and Secretary of State in 1990 to “initiate  
15 discussions” with other nations for agreements on climate research). As a result of those  
16 negotiations, President George H. W. Bush signed, and the Senate approved, the United Nations  
17 Framework Convention on Climate Change (“UNFCCC”), which brought together a coalition of  
18 countries to work toward a coordinated approach to address the international issue of global  
19 warming. *See* UNFCCC Homepage, at <http://unfccc.int> (last visited June 27, 2008). Following  
20 ratification of the UNFCCC, member nations negotiated the Kyoto Protocol, which called for  
21 mandatory reductions in the greenhouse gas emissions of developed nations. *See* Kyoto Protocol,  
22 art. 3, annex I, Dec. 10, 1997, 37 I.L.M. 22.

23       Although President Clinton signed the Kyoto Protocol, it was not presented to the Senate.  
24 Indeed, the Senate formally objected in an extraordinary 95-0 vote to any agreement that would  
25 result in serious harm to the economy or that did not include provisions regarding the emissions of  
26 developing nations. *See* S. Res. 98, 105th Cong. (1997). Thereafter, Congress enacted a series of  
27 laws that affirmatively barred EPA from implementing the Protocol. *See* Pub. L. No. 105-276, 112  
28 Stat. 2461, 2496 (1998); Pub. L. No. 106-74, 113 Stat. 1047, 1080 (1999); Pub. L. No. 106-377, 114

1 Stat. 1441, 1441A-41 (2000). President George W. Bush also opposes the Protocol because it  
 2 exempts developing nations. *See* Transcript, *President Bush Discusses Global Climate Change* (Jun.  
 3 11, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html>.

4 **3. The Relief Plaintiffs Seek.** Plaintiffs allege that global warming is caused by “human  
 5 activity that releases greenhouse gases,” and that a large percentage of the carbon dioxide currently  
 6 in the atmosphere was released decades and even centuries ago. Compl. ¶¶ 132, 125. They further  
 7 allege that defendants’ emissions “rapidly mix in the atmosphere” and “merge[] with the  
 8 accumulation of emissions . . . in the world.” *Id.* ¶¶ 254, 10. Yet, despite the ubiquity of greenhouse  
 9 gas emissions, plaintiffs seek to single out defendants—19 domestic energy producers—and hold  
 10 them liable for the risk of flooding in Kivalina allegedly caused by global warming. Alleging that  
 11 these defendants are “substantial contributors to global warming,” *id.* ¶ 253, plaintiffs seek joint and  
 12 several damages under federal common law and state private and public nuisance for the costs of  
 13 relocating from Kivalina. Plaintiffs have also filed derivative claims of “concert of action” against  
 14 all defendants, and “conspiracy” claims against eight defendants. *See id.* ¶ 189 & Third Claim for  
 15 Relief.

### 16 ARGUMENT

17 In this brief, all of the utility defendants<sup>2</sup> move to dismiss plaintiffs’ claims (other than the  
 18 conspiracy claim<sup>3</sup>) pursuant to Rules 12(b)(1) and 12(b)(6).<sup>4</sup> Under Rule 12(b)(1), this Court must  
 19 determine whether it has subject matter jurisdiction, and “may look beyond the complaint to matters  
 20 of public record” when making that determination. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.  
 21 2000). “[T]he presence of a political question precludes a federal court, under article III of the  
 22

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23 <sup>2</sup> For purposes of this motion, the phrase “utility defendants” refers to American Electric Power  
 24 Company, DTE Energy Corporation, Duke Energy Corporation, Dynegy Holdings, Inc., Edison  
 25 International, MidAmerican Energy Holdings Company, Pinnacle West Capital Corporation, Reliant  
 Energy, Inc., The AES Corporation, The Southern Company and Xcel Energy, Inc.

26 <sup>3</sup> The subset of utility defendants named in the conspiracy claim have filed a separate brief seeking  
 27 dismissal of that claim.

28 <sup>4</sup> In addition, certain utility defendants have filed a motion to dismiss under Rule 12(b)(2) for lack of  
 personal jurisdiction, thus preserving another jurisdictional objection to this lawsuit.

Constitution, from hearing or deciding the case.” *No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1382 (9th Cir. 1988); *see also Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 981-82 (9th Cir. 2007) (holding that the political question doctrine is “a *jurisdictional* limitation imposed on the courts by the Constitution”) (emphasis added). Under Rule 12(b)(6), this Court must dismiss “where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable theory.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). While all allegations of fact must be taken as true and all reasonable inferences drawn in favor of plaintiffs, the Court need not accept legal conclusions cast as factual allegations. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). And, while the Court generally may not look beyond the complaint when ruling on a Rule 12(b)(6) motion, it may consider matters of public record, such as formal pronouncements by agencies and officials, *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994), as well as documents cited in the complaint itself, *see United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003). These standards mandate dismissal of this suit.

#### **I. THIS LAWSUIT RAISES NONJUSTICIABLE POLITICAL QUESTIONS.**

Plaintiffs ask this Court to use the medium of a “nuisance” action to address an unprecedented worldwide phenomenon with sweeping implications for the nation’s economy, security, and foreign relations. Under our constitutional system, however, the complex issues raised by global warming can be resolved only by the politically accountable branches of the federal government, not by courts using judge-made principles. Indeed, Congress is already grappling with these issues, seeking—through a mix of regulatory authority, fuel efficiency standards, technology incentives and research mandates—to craft a comprehensive national scheme while the executive branch negotiates over a coordinated international response. Allowing this suit to proceed would undermine these efforts. Accordingly, as the other district courts that have confronted global warming tort claims have all recognized, suits such as this inescapably raise nonjusticiable political questions. *See California v. Gen. Motors Corp.*, No. 06-5755, 2007 WL 2726871, at \*6-16 (N.D. Cal. Sept. 17, 2007); *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005), appeal pending, Nos. 05-5104-cv & 05-5119-cv (2d Cir.); *Comer Oil v. Murphy Oil USA*, No.

1 1:05-cv-00436-LG-RHW, at 39 (S.D. Miss. Aug. 30, 2007), *appeal pending*, No. 07-60756 (5th  
2 Cir.) (attached as Exh. 1, hereafter “*Comer Order*”).

3 Although there is no single “political question” formula, the Supreme Court has explained  
4 that a case raises a nonjusticiable political question when any one of the following six factors is  
5 present:

- 6 (1) “a textually demonstrable constitutional commitment of the issue to a coordinate political  
7 department;”
- 8 (2) “a lack of judicially discoverable and manageable standards for resolving it;”
- 9 (3) “the impossibility of deciding without an initial policy determination of a kind clearly for  
10 nonjudicial discretion;”
- 11 (4) “the impossibility of a court’s undertaking independent resolution without expressing  
12 lack of the respect due coordinate branches of [the] government;”
- 13 (5) “an unusual need for unquestioning adherence to a political decision already made;” and
- 14 (6) “the potentiality of embarrassment from multifarious pronouncements by various  
15 departments on one question.”

16 *Baker v. Carr*, 369 U.S. 186, 217 (1962). In analyzing these factors, courts must make a  
17 “discriminating inquiry into the precise facts and posture of the particular case,” *id.*, focusing on the  
18 nature of the issues or questions to be resolved, not the generic nature of the case. *Planned*  
19 *Parenthood Fed’n of Am., Inc. v. AID*, 838 F.2d 649, 655-56 (2d Cir. 1988) (examining “precise  
20 issue”); *Alperin v. Vatican Bank*, 410 F.3d 532, 545 (9th Cir. 2005) (“question posed”); *Aktepe v.*  
21 *United States*, 105 F.3d 1400, 1403 (11th Cir. 1997) (negligence-based wrongful death suit raised  
22 nonjusticiable political questions); *Lane ex rel. Lane v. Halliburton Co.*, --- F.3d ---, 2008 WL  
23 2191200, at \*11 (5th Cir. May 28, 2008) (examining with “precision the elements” of plaintiffs’  
24 cause of action and recognizing that tort suit can raise political questions).

25 Here, a discriminating analysis reveals that courts have no “discoverable and manageable  
26 standards,” *Baker* 369 U.S. at 217, for deciding liability in this case. To develop such standards,  
27 courts must make “initial policy determination[s]” that are non-judicial in nature and that are  
28 committed by the Constitution to the political branches. *Id.* Moreover, imposition of liability would  
contradict judgments the political branches have already made. *Id.* Each of these factors is  
sufficient, by itself, to demonstrate that this case raises nonjusticiable political question, and must



1 therefore be dismissed. *See INS v. Chadha*, 462 U.S. 919, 941 (1983) (“a political question may  
2 arise when any one of the[se] circumstances is present”).

3 **A. There Are No Judicially Discoverable Or Manageable Standards For Resolving  
4 This Suit.**

5 Any “discriminating inquiry” into the “precise facts” of global warming makes clear that  
6 courts have no discoverable or manageable standards for resolving the issue of fault raised by this  
7 case. Tort liability “turns on a finding that the defendant was at fault in some important sense,” *i.e.*,  
8 that its conduct can be deemed “wrong.” Dan B. Dobbs & Paul T. Hayden, *Torts and Compensation*  
9 5 (3d ed. 1997). The mere act of emitting a naturally occurring, ubiquitous substance such as carbon  
10 dioxide, however, cannot be morally culpable; if it were, every human being would be engaged in a  
11 “wrong” by virtue of breathing. Accordingly, the Court must identify some “principled, rational,  
12 and . . . reasoned” basis, *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion), for  
13 determining *which* worldwide emissions of greenhouse gases are tortious and which are not.

14 It is clear that “vague and indeterminate nuisance concepts,” *City of Milwaukee v. Illinois*,  
15 451 U.S. 304, 317 (1981) (“*Milwaukee II*”), provide no such standards. Indeed, in prior global  
16 warming cases, plaintiffs have invoked the principle that a party can be liable for contributing to a  
17 nuisance even where the contribution is “relatively slight” and “by itself would not be . . .  
18 unreasonable.” Restatement (Second) of Torts § 840E cmt. b (1979).<sup>5</sup> Such a standard, however,  
19 has no logical stopping point, and would mean that every individual on earth could be held liable for  
20 contributing to this phenomenon.

21 The only way to avoid that absurd result would be to hold that certain carbon dioxide-  
22 producing activities are more blameworthy than others, or that emissions above a certain level for  
23 particular activities are societally unreasonable. But existing tort principles provide no standards for  
24 making such judgments. *Gen. Motors*, 2007 WL 2726871, at \*15 (courts are “without guidance in  
25 determining what is an unreasonable contribution to the sum of carbon dioxide in the Earth’s  
26 atmosphere”). Instead, as defendants show next, such judgments are “initial policy determination[s]

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27 <sup>5</sup> *See* California’s Opening Br. at 30-31, 33, *California v. Gen. Motors Corp.*, Case No. 07-16908  
28 (9th Cir. filed Jan. 31. 2008); Br. for Plaintiffs-Appellants at 55, *Connecticut v. Am. Elec. Power  
Co., Inc.*, No. 05-5104-cv (2d Cir. filed Dec. 15, 2005).



1 of a kind clearly for non judicial discretion” that are committed by the Constitution to the political  
2 branches of the federal government. *Baker*, 369 U.S. at 217.

3 **B. Resolution Of The Issue Of Liability In This Case Requires Initial Policy**  
4 **Decisions That Cannot Properly Be Made By The Judiciary.**

5 A court cannot decide that defendants’ past emissions were blameworthy in ways that  
6 millions of other emissions were not, or that the amount of defendants’ past emissions was  
7 “unreasonable,” without determining what the proper balance was between (a) the risk of global  
8 warming-related harms and (b) the multifaceted societal costs that would have resulted if defendants  
9 had fundamentally altered energy production in order to achieve significant greenhouse gas  
10 reductions, as well as the risk that such costs would not have resulted in any meaningful benefit,  
11 because any reductions would have been offset by emissions elsewhere. The necessity of striking  
12 such a balance in order to decide the question of “fault” can best be illustrated by assuming that  
13 plaintiffs could prove, as a scientific fact, that the ice that formerly protected their island would not  
14 have melted if the utility defendants had ceased generating electricity from fossil fuel-fired plants as  
15 of a specific date, *e.g.*, 1980. To find that the utilities had a tort-based duty to shut down all of those  
16 plants, the Court or jury would have to weigh the massive economic and other societal dislocations  
17 that such an abrupt shut-down would have entailed, and then decide that those costs were  
18 outweighed by the risk that Kivalina would be subject to an unacceptable risk of flooding absent  
19 such a shut-down.

20 Of course, it is inconceivable that a jury could find that the utility defendants’ “failure” to  
21 shut down all fossil fuel-fired plants in 1980 renders them liable in damages to plaintiffs. Electricity  
22 is indispensable to modern American life. It is a primary input to virtually all economic activity. It  
23 powers innumerable safety devices and systems, prevents deaths from heat in summer and from cold  
24 in winter, and powers our military and homeland security. The list of critical uses of electricity is  
25 nearly endless. The consequences of shutting down defendants’ fossil fuel-fired power plants,  
26 therefore, would have been catastrophic for our citizens. Only a legislature has the capacity and  
27 authority to make the judgment that the threat of harm from global warming outweighs the  
28 innumerable societal harms that would flow from such drastic action.

1           The necessity of making such a political judgment cannot be avoided merely by disavowing  
2 this drastic remedy and alleging that defendants had a duty to adopt “alternatives to fossil fuel  
3 combustion.” Compl. ¶ 174. While plaintiffs allege that the costs of such technologies have  
4 declined, *id.*, they do not allege that such alternatives would not have affected the cost or reliability  
5 of electricity to millions of consumers. Nor could they. Congress has recognized that stabilizing  
6 and reducing U.S. carbon dioxide levels has enormous “economic, energy, social, environmental,  
7 and competitive implications, including implications for jobs.” 42 U.S.C. § 13381(1). EPA has  
8 likewise stated that significant reductions in U.S. carbon dioxide emissions will be achieved only if  
9 U.S. power generation “undergo[es] widespread and wholesale transformations, affecting every  
10 sector of the nation’s economy and threatening its overall economic health.” Memorandum from  
11 Robert E. Fabricant, EPA General Counsel, to Marianne L. Horinko, Acting Administrator 9 (Aug.  
12 28, 2003); *see also Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg.  
13 52,922, 52,928 (Sept. 8, 2003) (the “production and use of fossil fuel-based energy undergirds  
14 almost every aspect of the U.S. economy”).

15           Thus, to conclude that defendants had a tort-based duty to achieve significant reductions in  
16 carbon dioxide emissions by building wind farms or deploying solar energy, a court or jury would  
17 have to determine the effects that these alternatives would have had on the cost and reliability of  
18 electricity, and the resulting consequences on industries and businesses, low- and fixed-income  
19 consumers, and essential safety systems. The court or jury would then have to decide that these  
20 societal impacts were outweighed by the risk that defendants’ emissions would contribute to global  
21 warming in a manner that significantly increased the likelihood of plaintiffs’ injuries, taking into  
22 account the possibility that costly and societally disruptive emissions reductions would have been  
23 offset by increased emissions elsewhere. *See Control of Emissions*, 68 Fed. Reg. at 52931 (“Any  
24 potential benefit of [greenhouse gas] regulation could be lost to the extent other nations decided to  
25 let their emissions significantly increase in view of U.S. emission reductions.”). In addition, this  
26 balance of societal costs and benefits would have to be compared against the cost/benefit calculus  
27 associated with reducing other sources of carbon dioxide, because defendants’ alleged failure to  
28

1 reduce their carbon dioxide emissions cannot be deemed societally unreasonable if there were less  
2 costly or less disruptive ways of avoiding plaintiffs' alleged harms.

3       There is, obviously, no way for a court or jury to determine the "correct" balance of such  
4 broad and competing societal interests. Such a judgment is a matter of political consensus, not  
5 scientific proof. Under the Constitution, the task of making such judgments is not assigned to the  
6 courts. Rather, "controversies which revolve around policy choices and value determinations [are]  
7 constitutionally committed to the halls of Congress or the confines of the Executive Branch." *Japan*  
8 *Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Indeed, the Supreme Court has  
9 repeatedly explained that decisions that affect the safety or security of the nation "should be  
10 undertaken only by those directly responsible to the people whose welfare they advance or imperil."  
11 *Chi & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Issues of "high policy"  
12 must be resolved

13               "within the legislative process after the kind of investigation,  
14 examination, and study that legislative bodies can provide and courts  
15 cannot. That process involves the balancing of competing values and  
interests, which in our democratic system is the business of elected  
representatives."

16 *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 647 (1981) (quoting *Diamond v.*  
17 *Chakrabarty*, 447 U.S. 303, 317 (1980)).

18       For these reasons, the other district courts that have confronted global warming tort claims  
19 have concluded, correctly, that such claims cannot be adjudicated in the absence of an initial policy  
20 determination that can be made only by the political branches. *Gen. Motors*, 2007 WL 2726871, at  
21 \*7-8; *Connecticut*, 406 F. Supp. 2d at 272-74; *Comer Order* at 39-40.<sup>6</sup> Plaintiffs' claims should be  
22 dismissed for the same reasons here.

23  
24  
25 <sup>6</sup> Because the question of fault requires such inherently political judgments, the fact that plaintiffs  
26 seek damages rather than injunctive relief in no way renders their claim justiciable. *See Gen.*  
27 *Motors*, 2007 WL 2726871, at \*8 (explicitly addressing issue); *Comer Order* at 39-40 (dismissing  
28 tort-based suit for damages); *see also Aktepe*, 105 F.3d at 1403 (dismissing negligence-based  
wrongful death suit for damages because it raised nonjusticiable political questions).

**C. Imposition Of Liability In This Case Would Contradict The Judgments Of The Political Branches.**

Imposition of liability would also contradict policy judgments the political branches have made about the proper response to greenhouse gas emissions in light of competing economic, environmental and foreign relations interests. A finding of liability in this case would rest on, among other things, a judgment that each defendant should have reduced emissions by some specified amount, and that incurring the costs of such reductions would have been the societally reasonable way of avoiding plaintiffs' injuries. Congress and the President, however, have decided that global warming should be addressed in a comprehensive, coordinated, and multilateral manner, and that unilateral or *ad hoc* reductions entail undue harms *without* corresponding benefits.

Greenhouse gas emissions are not static. One entity may decrease emissions while another increases them, resulting in the same overall level of emissions. *See Control of Emissions*, 68 Fed. Reg. at 52931. For that very reason, the political branches declined to adopt the Kyoto Protocol, which sought to impose emissions caps on developed nations, but not developing ones like China and India. *See* Kyoto Protocol, art. 3, annex I, Dec. 10, 1997, 37 I.L.M. 22. The President opposes the Protocol because this asymmetry would have "a negative economic impact, with layoffs of workers and price increases for consumers."<sup>7</sup> The Senate cited these same concerns in urging President Clinton, in a 95-0 vote, not to sign the Protocol. *See* S. Res. 98, 105th Cong. (1997). And, before President's Bush's election, Congress used appropriations legislation to bar implementation of the Protocol. *See supra* at 6-7 (citing statutes). Those actions are consistent with Congress's longstanding strategy of requiring "dramatic and possibly higher cost [responses to global warming] . . . only in the context of concerted international action." H.R. Rep. No. 102-474, pt. I, at 152 (1992), reprinted in 1992 U.S.C.C.A.N. 1954, 1975 (emphasis added); *see also* Pub. L. No. 100-204, tit. XI, §§ 1102(3), 1103(a), 101 Stat. 1407, 1408 (1987) (codified at 15 U.S.C. § 2901 note) (declaring that U.S. policy is to "identify technologies and activities to limit mankind's adverse effect on the global climate . . . and . . . work toward [international] agreements").

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<sup>7</sup> *See* Transcript, *President Bush Discusses Global Climate Change* (Jun. 11, 2001), available at <http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html>.

1 In the absence of concerted international action, Congress has called for a comprehensive  
 2 national response that is sensitive to the economic implications of significant greenhouse gas  
 3 reductions. The Energy Policy Act of 1992 directed the Secretary of Energy to assess various  
 4 options for reducing greenhouse gas emissions and to report on their “feasibility and economic,  
 5 energy, social, environmental, and competitive implications, including implications for jobs.” 42  
 6 U.S.C. §§ 13381(1), 13384. That Act also requires the Executive Branch to develop a plan for  
 7 “stabilization and eventual reduction in the generation of greenhouse gases.” *Id.* § 13382(a)(2), (g).  
 8 More recently, the Energy Policy Act of 2005 called for a “national strategy to promote the  
 9 deployment and commercialization” of technologies to reduce greenhouse gas intensity. *See id.*  
 10 § 13389(c)(1). And, as noted earlier, the Energy Independence and Security Act of 2007 creates  
 11 vehicle-emissions reduction planning and incentive programs, requires an assessment of carbon  
 12 sequestration methods, creates grant programs to accelerate research and development of non-carbon  
 13 emitting technologies, and adopts fuel efficiency standards that function as emissions standards for  
 14 automobiles.” *See* Pub. L. No. 110-140, §§ 101-136, 601-636, 711-714, 121 Stat. at 1498-1516,  
 15 1674-88, 1710-15 (codified at 42 U.S.C. chs. 149, 152, 329).

16 Thus, the political branches charged with managing foreign affairs and protecting both the  
 17 nation’s economy and its environment have decided that, in the absence of emissions limits in  
 18 developing nations, mandatory U.S. reductions pose a risk of significant economic harm without  
 19 sufficient assurance of a corresponding environmental benefit. Accordingly, Congress has ordered a  
 20 careful phasing-in of a functional emissions cap for automobiles, conferred authority on an expert  
 21 and politically accountable agency to determine whether and how to regulate greenhouse gas  
 22 emissions going forward, and promoted the development of new technologies. A finding of liability  
 23 in this case, however, would inescapably entail a contrary judgment: that defendants should have  
 24 significantly reduced their emissions by particular amounts years ago, and that any economic harms  
 25 caused by such reductions would have yielded worthwhile environmental benefits.

26 Nor is this the only conflict between plaintiffs’ preferred response to global warming and that  
 27 adopted by the political branches. Congress has called for “a coordinated national policy on global  
 28 climate change.” 15 U.S.C. § 2938(b)(1). Lawsuits like this, however, employ an uncoordinated

1 piecemeal approach, in which various plaintiffs select U.S. companies they deem blameworthy, and  
 2 ask for retroactive liability for failure to undertake emissions reductions that Congress and the  
 3 executive have thus far declined to require. These suits would impose the burdens of regulation, *see*  
 4 *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (Stevens, J.) (“regulation can be . . .  
 5 effectively exerted through an award of damages”) (internal quotation marks omitted), with none of  
 6 its benefits; each jury award will simply reflect a judgment that a particular defendant’s emissions  
 7 were “unreasonable,” but will provide no guidance to others about what level would be reasonable.

8 Finally, judicially-compelled reductions of U.S. greenhouse gas emissions would contradict  
 9 the President’s judgment about how to induce other nations to reduce their emissions. The President  
 10 believes that, to implement Congress’s directive to “work toward [international] agreements” on  
 11 issues of climate change, 15 U.S.C. § 2901 note, the prospect of mandatory U.S. emission limits can  
 12 be used as a bargaining chip in exchange for comparable restrictions by others. If successful,  
 13 however, plaintiffs’ claims would result in unilateral, judicially-compelled emissions reductions on  
 14 U.S. companies through the imposition of tort liability, *see Cipollone*, 505 U.S. at 521 (Stevens, J.),  
 15 and would thus conflict with the President’s negotiating strategy. *See Control of Emissions*, 68 Fed.  
 16 Reg. at 52931 (mandatory unilateral U.S. reductions could “weaken U.S. efforts to persuade key  
 17 developing countries to reduce the [greenhouse gas] intensity of their economies”); *Gen. Motors*,  
 18 2007 WL 2726871, at \*14 (characterizing U.S. foreign policy as “deliberately elect[ing] to refrain  
 19 from any unilateral commitment to reducing [greenhouse gas] emissions domestically unless  
 20 developing nations make a reciprocal commitment”). Plaintiffs’ counsel may believe the nation’s  
 21 bargaining-chip strategy is “bizarre.” Matthew F. Pawa, *Global Warming Litigation Heats Up*, Trial  
 22 Apr. 2008, at 18, 20. But the political question doctrine deprives courts of jurisdiction over suits,  
 23 such as this one, that cannot be adjudicated without “implicitly questioning, and even condemning,  
 24 United States foreign policy.” *Corrie*, 503 F.3d at 983-84.

25 All of the foregoing conflicts between the judgments of the political branches and those  
 26 plaintiffs will ask the Court to make confirm the inherently political nature of the issues raised by  
 27 this case—issues courts cannot resolve. *See Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995)  
 28 (final three *Baker* factors apply where “judicial resolution of a question would contradict prior

decisions taken by a political branch”); *Connecticut*, 406 F. Supp. 2d at 274 (“Because the resolution of the issues presented [*i.e.*, global warming] here requires identification and balancing of economic, environmental, foreign policy, and national security interests, an initial policy determination of a kind clearly for non-judicial discretion is required.”) (internal quotations omitted); *Gen. Motors*, 2007 WL 2726871, at \*14 (finding that “Plaintiff’s federal common law global warming nuisance tort would have an inextricable effect on interstate commerce and foreign policy-issues constitutionally committed to the political branches of government”).

## II. PLAINTIFFS LACK STANDING.

To have Article III standing, plaintiffs must have suffered an injury-in-fact that was caused by defendants and is redressable by this Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Because this Court is presumed to lack Article III jurisdiction, plaintiffs must plead facts sufficient to establish each of these indispensable elements. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). And these “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). “It is not . . . proper to assume that [plaintiffs] can prove facts that [they] ha[ve] not alleged,” and mere “labels and conclusions, [or] a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 1965, 1969 n.8 (omission in original; citation and internal quotation marks omitted). For that reason, courts need not “accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged.” *Clegg*, 18 F.3d at 754-55.

Plaintiffs allege an injury—*i.e.*, flooding due to storm damage and erosion from a loss of Arctic sea ice that formerly protected their island. But they do not and cannot allege that it was defendants’ emissions—and not “the independent action of some third party not before the court,” *Lujan*, 504 U.S. at 560—that caused this injury. Moreover, plaintiffs’ allegations make clear that their alleged injuries are too remote from defendants’ conduct to satisfy Article III’s causation requirement. The complaint should therefore be dismissed for lack of standing.

### A. Plaintiffs Have Failed To Plead Facts Establishing Article III Causation.

Plaintiffs have plainly failed to allege Article III causation. Their complaint sets forth detailed allegations concerning global warming, Compl. ¶¶ 123-161, defendants’ emissions, *id.*



¶¶ 163-180, and plaintiffs’ alleged injuries, *id.* ¶¶ 185-188. But it recites no *facts* which, if proved, would establish a non-speculative basis for finding that *defendants’* emissions caused plaintiffs’ injuries. Instead, plaintiffs offer “formulaic recitation[s],” *Twombly*, 127 S. Ct. at 1965, of causation, asserting that defendants’ emissions “are a direct and proximate contributing cause” of their injuries; that defendants, “individually and collectively, are substantial contributors” to those injuries; and that their “injuries from each defendant’s contributions to global warming are indivisible.” Compl. ¶¶ 251, 253, 256. These are bare “legal conclusions” masquerading as factual allegations that cannot establish this Court’s jurisdiction. *Clegg*, 18 F.3d at 754-55.

The facts that plaintiffs do allege, moreover, establish that their alleged injuries are *not* fairly traceable to defendants. Plaintiffs allege that a “large fraction of carbon dioxide emissions persist in the atmosphere for *several centuries*,” and that nearly two-thirds of the atmospheric increase in this gas over the past three centuries resulted from emissions dating from “the dawn of the industrial revolution in the 18<sup>th</sup> century” to 1980. Compl. ¶ 125 (emphasis added). And plaintiffs do not merely allege that global warming is caused by emissions that span hundreds of years. They also allege that it is caused by emissions from sources that span the planet. Thus, they allege that “combustion of fossil fuels”—not just fossil fuels produced or used by defendants—“add[] large quantities . . . of carbon dioxide[] to the atmosphere,” and that natural processes that remove carbon dioxide “are unable to keep pace with *these emissions*.” *Id.* ¶ 126 (emphasis added); *see also id.* ¶ 132 (“human activity that releases greenhouse gases is causing a change in the Earth’s climate”). And plaintiffs admit that specific harms cannot be traced to defendants, because their emissions “rapidly mix in the atmosphere” and “inevitably merge[] with the accumulation of emissions in California and in the world.” *Id.* ¶¶ 254, 10; *see also Control of Emissions*, 68 Fed. Reg. at 52,927 (explaining that greenhouse gases mix in “relatively homogenous concentrations around the world”).

For these very reasons, the *Comer* court dismissed a similar complaint for lack of standing, ruling that the plaintiffs’ injuries were not “fairly attributable” to many of the same defendants that plaintiffs have sued here. *Comer Order* at 36. The court noted that everyone on the planet was responsible to some degree “for the emission of [carbon dioxide] and ultimately greenhouse gases which cause global warming.” *Id.* The injuries asserted by plaintiffs in that case, therefore, were not



1 “traceable to these individual defendants but . . . instead . . . are attributable to a larger group that [is]  
 2 not before this Court, not only within this nation but outside of our jurisdictional boundaries as  
 3 well.” *Id.* Here, too, plaintiffs’ own allegations make clear that their alleged injuries are not fairly  
 4 traceable to these defendants, but to countless entities around the globe. *See also Tex. Indep.*  
 5 *Producers & Royalty Owners Ass’n v. EPA*, 410 F.3d 964, 974 (7th Cir. 2005) (failure to account for  
 6 pollution attributable to others precluded traceability to one industry’s discharges). Boilerplate  
 7 recitations that defendants’ emissions “are a direct and proximate contributing cause of” plaintiffs’  
 8 injuries, Compl. ¶ 251, cannot mask this fatal defect.

9       Indeed, the decision in *Massachusetts* confirms that plaintiffs cannot establish causation.  
 10 Like plaintiffs here, Massachusetts claimed that domestic emissions contributed to global warming,  
 11 which caused harm to its land. *See* 127 S. Ct. at 1457-58. The Court held that Massachusetts could  
 12 seek judicial review of EPA’s refusal to regulate greenhouse gas emissions from new motor vehicles  
 13 under the CAA “‘without meeting all the normal standards’” of Article III standing. *Id.* at 1453  
 14 (emphasis added) (quoting *Lujan*, 504 U.S. at 572 n.7). In justifying the relaxed standing standards  
 15 it applied in that case to Massachusetts, the Court stressed that the statutory right to judicial review  
 16 was “of critical importance,” *id.* (citing 42 U.S.C. § 7607(b)(1)), and that, as a State, Massachusetts  
 17 was entitled to “special solicitude in [the] standing analysis.” *Id.* at 1454-55. The Court thus applied  
 18 *relaxed* standing standards because Massachusetts could not meet Article III’s *normal* requirements.  
 19 *See id.* at 1466 (Court’s relaxed standards are “an implicit concession that petitioners cannot  
 20 establish standing in traditional terms”) (Roberts, C.J., dissenting).

21       Here, plaintiffs are not entitled to any relaxed standing rules: They are not States,<sup>8</sup> they  
 22 invoke no statutory right to judicial review of agency action, and they cannot rely on congressionally

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23  
 24 <sup>8</sup> Plaintiffs did not join the Union on the same terms as States, and thus are not entitled to “special  
 25 solicitude” in the standing analysis. *See Massachusetts*, 127 S. Ct. at 1454-55 (terms on which they  
 26 joined the Union justified “special solicitude” for States in the standing analysis). Instead, the 1867  
 27 Treaty of Cession is an agreement between the United States and *Russia* (not any Alaska Natives),  
 28 and it provides that Alaska Natives “will be subject to such laws and regulations as the United States  
 may, from time to time, adopt.” Cession of the Russian Possessions in North America, U.S. – Russ.,  
 art. 3, Mar. 30, 1867, 15 Stat. 539, 542. Moreover, in *Massachusetts* the Court relied on the State’s  
 unique interest in “preserv[ing] its sovereign territory.” 127 S. Ct. at 1454-55. Plaintiffs, by  
 contrast, have no territorial sovereignty. In the Alaska Native Claims Settlement Act of 1971

(Footnote continued)

1 “‘articulate[d] chains of causation.’” *Id.* at 1453 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J.,  
 2 concurring)). Their allegations of causation thus fail as a matter of law to satisfy Article III’s  
 3 “normal standards” for determining standing.

4 **B. Plaintiffs’ Injuries Are Too Remote To Satisfy Article III Causation.**

5 Plaintiffs’ injuries are not fairly traceable to defendants’ emissions for yet another reason:  
 6 their injuries are too remote from defendants’ actions. *See In re African-American Slave*  
 7 *Descendants Litig.*, 471 F.3d 754, 761 (7th Cir. 2006), *cert. denied*, 128 S. Ct. 92 (2007) (remoteness  
 8 is “a limitation on Article III standing”). Injuries are too remote to establish Article III causation  
 9 when they can be connected to the alleged wrongful conduct only by multiple links in an attenuated  
 10 chain of causation. *See, e.g., Camden County Bd. of Chosen Freeholders v. Baretta U.S.A. Corp.*,  
 11 123 F. Supp. 2d 245, 257 (D.N.J. 2000), *aff’d*, 273 F.3d 536 (3d Cir. 2001). Here, the alleged chain  
 12 of causation includes at least the following highly attenuated links:

- 13 (1) defendants’ operations emit carbon dioxide, Compl. ¶ 3;
- 14 (2) those emissions “mix in the atmosphere” and “merge[] with the accumulation of  
 15 emissions in California and in the world,” *id.* ¶¶ 254, 10;
- 16 (3) these accumulated emissions—a large fraction of which were emitted decades and even  
 17 several centuries ago—trap heat, *id.* ¶¶ 123, 125;
- 18 (4) over some unknown period of time, the pool of trapped heat raised the temperature of the  
 19 atmosphere, *id.* ¶¶ 123, 127;
- 20 (5) increased atmospheric temperature has melted glaciers and ice caps, and raised ocean  
 21 temperatures, both of which cause sea levels to rise, *id.* ¶¶ 130-131;
- 22 (6) increased temperatures have caused a loss of sea ice, *id.* ¶ 185;
- (7) the loss of sea ice left Kivalina’s coast more vulnerable to intervening storm surges and  
 erosion, *id.*;

23 (ANCSA), 43 U.S.C. §§ 1601 *et seq.*, the United States “revoked . . . existing reservations in  
 24 Alaska” and “transferred reservation lands to private, state-chartered Native corporations, without  
 25 any restraints on alienation or significant use restrictions.” *Alaska v. Native Vill. of Venetie Tribal*  
 26 *Gov’t*, 522 U.S. 520, 524, 532 (1998). ANCSA thus made Alaska Native Villages at most  
 27 “‘sovereigns without territorial reach.’” *Id.* at 526 (quoting *Alaska ex rel. Yukon Flats Sch. Dist. v.*  
 28 *Native Vill. of Venetie Tribal Gov’t*, 101 F.3d 1286, 1303 (9th Cir. 1996) (Fernandez, J.,  
 concurring)) (emphasis added); *see also* 101 F.3d at 1304 (Fernandez, J., concurring) (ANCSA  
 “meant that the tribes . . . would no longer have control or sovereign power over the land.”  
 (emphasis added)), *rev’d on other grounds sub nom.*, 522 U.S. 520 (1998).

(8) the resulting damage has created an unacceptable risk of flooding, which renders the island unsafe, *id.*

There are simply too many attenuated links in this asserted causal chain, spread over too long and indefinite a period, for plaintiffs' alleged injuries to be deemed "fairly traceable" to defendants. *See In re African-Am. Slave Descendants Litig.*, 471 F.3d at 759 (affirming dismissal for lack of Article III standing where causal chain was "too long and ha[d] too many weak links for a court to be able to find that the defendants' conduct harmed the plaintiffs at all"); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 541 (3d Cir. 2001) (per curiam) (causal chain with seven links was "too attenuated to attribute sufficient control to the manufacturers to make out a public nuisance claim"). Plaintiffs lack standing for this reason as well.

### **III. PLAINTIFFS HAVE NO FEDERAL CAUSE OF ACTION.**

Even if plaintiffs had standing, no federal cause of action encompasses their claims. In prior global warming suits, plaintiffs have invoked a narrow, judge-made remedy the Supreme Court recognized a century ago—when the Constitution was thought to preclude any other branch of government from addressing even a simple transboundary nuisance. But this limited remedy, which merely allows States to abate nuisances of "simple type," does not remotely encompass the extraordinary "nuisance" claim plaintiffs assert. Any attempt to expand that cause of action would contravene the Supreme Court's repeated admonition that federal courts should no longer create or expand federal causes of action. And any expanded version of the cause of action that could encompass plaintiffs' claims has been displaced by federal law that speaks directly to the issues raised by plaintiffs' claims.

#### **A. No Federal Common Law Cause Of Action Encompasses Plaintiffs' Claim.**

Plaintiffs can identify no action for their purported federal common law claims, even if they reach back over a century to cases that rest on now outmoded theories of federal common law. In *Missouri v. Illinois*, 180 U.S. 208 (1901) ("*Missouri I*"), and *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) ("*Tennessee Copper I*"), the Court relied on a theory of constitutional necessity to create causes of action for States to enjoin interstate water and air pollution. The Court explained that, in joining the Union, the States had surrendered their "[d]iplomatic powers and the right to make war."

1 *Missouri I*, 180 U.S. at 241; *see also Tennessee Copper I*, 206 U.S. at 237. Thus, the States could no  
 2 longer abate nuisances originating outside their borders. And the Court had held that Congress  
 3 lacked the power to regulate the types of intra-state activities that cause interstate pollution. *See*,  
 4 *e.g., United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (holding that Congress could not regulate  
 5 activities such as production, manufacturing, and mining).<sup>9</sup>

6 The Court stressed, however, that state demands to abate interstate pollution must be  
 7 examined with “caution.” *Tennessee Copper I*, 206 U.S. at 237. The Court could recognize only  
 8 “some such demands,” *id.* (emphasis added), and could not create a remedy for “every matter which  
 9 would warrant a resort to equity by one citizen against another.” *Missouri v. Illinois*, 200 U.S. 496,  
 10 520-21 (1906) (“*Missouri II*”). It was only “a public nuisance of *simple type* for which a *state* may  
 11 properly ask an injunction.” *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923) (emphasis  
 12 added); *see also Illinois v. City of Milwaukee*, 406 U.S. 91, 106 n.8 (1972) (“*Milwaukee I*”) (same).

13 The Court’s cases make clear that “simple type” nuisances involve immediately noxious or  
 14 harmful substances that cause severe, localized harms directly traceable to an out-of-state source.<sup>10</sup>  
 15 These “simple type” nuisances, the Court explained, entitled an injured State to “stand[] upon her  
 16 extreme rights,” regardless of the “possible disaster to those outside the state.” *Tennessee Copper I*,  
 17 206 U.S. at 239. Thus, even before the Court dramatically limited the use of federal common law in  
 18 *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), it developed “*exacting standards* of judicial  
 19 intervention” for interstate pollution cases. *W. Va. ex rel. Dyer v. Sims*, 341 U.S. 22, 27 (1951)

20  
 21 <sup>9</sup> *Missouri I* relied on *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838), where the Court  
 22 explained that, because States had surrendered their rights to make treaties or wage war and  
 23 Congress had no authority to adjust boundaries, *id.* at 724-26, “the judicial power is the *only* means  
 24 left for legally adjusting . . . a controverted boundary,” *id.* at 726 (emphasis added). *Rhode Island*  
 relied on the Constitution’s grant of jurisdiction over cases involving States to create the cause of  
 action for boundary disputes. *Id.* at 726-27.

25 <sup>10</sup> *See Tennessee Copper I*, 206 U.S. at 236 (“noxious gas” that destroyed forests, orchards and  
 26 crops); *Missouri II*, 200 U.S. at 517 (“poisonous filth” into waterways used for drinking and  
 27 agriculture); *New Jersey v. New York*, 283 U.S. 473, 476-77 (1931) (ocean-dumping of “noxious,  
 28 offensive and injurious materials” that caused “great and irreparable injury” to beaches); *North*  
*Dakota*, 263 U.S. at 371-72 (flood waters that destroyed crops and arable land); *see also Gen.*  
*Motors*, 2007 WL 2726871, at \*15 (summarizing these and other cases as involving “issues of local  
 concern” arising “from a source-certain nuisance originating in a neighboring state”).

(emphasis added). By limiting the cause of action to States seeking injunctive relief for “simple type” nuisances, the Court ensured that it would not exceed the “inherent limitations of [the judiciary’s] ability to deal with multifarious local problems,” *id.*, or “take[] the place of a legislature” and decide difficult questions for which the Constitution’s jurisdictional grants provide no guidance, *Missouri II*, 200 U.S. at 519-20.

Plaintiffs’ claims clearly fall outside the narrow cause of action the Supreme Court created a century ago. In its transborder pollution cases, the Court has never recognized claims by non-State plaintiffs or claims for damages. To the contrary, in *Middlesex County Sewerage Authority v. National Sea Clammers Ass’n*, 453 U.S. 1 (1981), it noted that a federal nuisance claim for damages by a private party would go “considerably beyond [*Milwaukee I*], which involved purely *prospective relief* by a state.” *Id.* at 10 (emphases added; citation omitted); *see also Gen. Motors*, 2007 WL 2726871, at \*15 (noting that the Court’s cases all involved claims for equitable relief). Moreover, the Supreme Court’s rationale for creating the cause of action is wholly inapplicable here: Plaintiffs surrendered no sovereign rights in exchange for a judicial remedy, *see* note 8, *supra*, and are not beneficiaries of the Article III jurisdictional grants from which the Court derived the remedy.

Perhaps most importantly, plaintiffs have not pled a nuisance of “simple type.” Far from alleging that immediately noxious or harmful substances are causing severe localized harms directly traceable to an out-of-state source, plaintiffs claim defendants are contributing to an unprecedented worldwide problem that cannot be traced to any particular sources, but is instead allegedly caused by countless activities around the globe. *See* Compl. ¶¶ 254-255 (defendants’ emissions “rapidly mix in the atmosphere” and, “in combination with emissions and conduct of others, contribut[e] to global warming”); *id.* ¶ 10. The Supreme Court has never recognized a claim in which the contributions of countless non-parties were essential ingredients to the plaintiffs’ alleged harm. *See Gen. Motors*, 2007 WL 2726871, at \*15 (noting the “unprecedented” nature of a similar global warming claim). Instead, the Court has deemed actionable only those claims in which a State alleges that the defendants *alone* caused “great and irreparable injury,” *New Jersey v. New York*, 283 U.S. 473, 476 (1931).

**B. Plaintiffs Necessarily Seek An Impermissible Expansion Of The Federal Common Law Cause Of Action For Transboundary Pollution.**

The “exacting standards” of the federal common law cause of action cannot be relaxed, and the narrow scope of that cause of action cannot be broadened, to encompass plaintiffs’ claims. For over 30 years, the Supreme Court has repeatedly held that federal courts should no longer create or expand causes of action. For example, although implying causes of action from statutes was a classic exercise of federal common lawmaking power, *see, e.g., Henry J. Friendly, In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 421 (1964), the Court has emphatically repudiated the practice, *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). It has likewise refused to expand causes of action previously implied from statutes. *See, e.g., Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008) (refusing to expand right of action implied from federal securities laws); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (same). Similarly, for more than two decades the Court has “consistently refused to extend *Bivens* liability to any new context or new category of defendants.” *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 67-68 (2001). And, most recently, the Court declined to create a federal common law cause of action for violations of international legal norms—even though the Alien Tort Statute expressly authorized such judicial lawmaking. “[A] decision to create a private right of action,” the Court emphasized, “is one better left to legislative judgment in the great majority of cases.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

The Court has likewise held that federal courts cannot use their “limited” and “restricted” authority to formulate federal common law to make significant policy decisions. *Tex. Indus.*, 451 U.S. at 640. Federal courts could not create a federal common law right to contribution in antitrust actions because such a right is “a matter of high policy for resolution within the legislative process.” *Id.* at 647 (internal quotation marks omitted). Similarly, federal courts could not create federal common law tort standards for advisers to federally-insured thrifts, because weighing the relevant factors is a task “for those who write the laws, rather than for those who interpret them.” *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994) (internal quotation marks omitted).



1 The Court last re-affirmed the federal common law cause of action for transboundary  
 2 pollution in 1972, *see Milwaukee I*, 406 U.S. 91, before it “swor[e] off the habit” of creating causes  
 3 of action, *Alexander*, 532 U.S. at 287. There are thus very good reasons to doubt the continued  
 4 vitality of that cause of action.<sup>11</sup> Nevertheless, even if *Milwaukee I* is good law, the Supreme  
 5 Court’s recent decisions preclude expanding the cause of action to provide a remedy for plaintiffs.

6 Notably, the Court’s hostility towards implied causes of action has been aimed primarily at  
 7 *private* actions for *damages*. The Court has stressed that “bedrock principles of separation of powers  
 8 foreclose[] judicial imposition of a new substantive liability,” even where “existing remedies do not  
 9 provide complete relief.” *Malesko*, 534 U.S. at 69 (internal quotation marks omitted). The creation  
 10 of private damages actions “raises issues beyond the mere consideration whether underlying primary  
 11 conduct should be allowed.” *Sosa*, 542 U.S. at 727; *see also Tex. Indus.*, 451 U.S. at 646-47  
 12 (refusing to recognize liability for contribution in antitrust cases); *Nw. Airlines, Inc. v. Transp.*  
 13 *Workers Union of Am.*, 451 U.S. 77, 98-99 (1981) (refusing to create right of contribution under  
 14 Title VII). Requests for injunctive relief, by contrast, do limit judicial consideration to “whether  
 15 underlying primary conduct should be allowed.” Thus, plaintiffs’ request that the Court extend the  
 16 constitutionally suspect interstate nuisance action to claims for damages by private parties would  
 17 involve precisely the type of judicial lawmaking the Supreme Court has renounced.

18 Moreover, expanding the cause of action to encompass the novel nuisance plaintiffs allege  
 19 would force this Court to make precisely the types of “high policy” decisions that it cannot make  
 20 under the rubric of federal common law. As discussed above, this Court can rule that the utility  
 21 defendants’ emissions were “unreasonable,” Compl. ¶ 250, or that these defendants breached a duty  
 22

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23 <sup>11</sup> *Milwaukee I* relied on the theory that statutory remedies “are not necessarily the only federal  
 24 remedies available,” 406 U.S. at 103—the very theory the Court has since abandoned. *Alexander*,  
 25 532 U.S. at 287. Moreover, the theory of constitutional necessity that justified recognition of the  
 26 cause of action has been vitiated, as Congress is now understood to possess plenary authority to  
 27 regulate intrastate activities affecting interstate air and water quality. *United States v. Lopez*, 514  
 28 U.S. 549, 556 (1995) (in 1937, Court “ushered in an era of Commerce Clause jurisprudence that  
 greatly expanded the previously defined authority of Congress”). The Court’s 1981 ruling that  
 amendments to the Clean Water Act displaced the federal common law cause of action for interstate  
 water pollution, *Milwaukee II*, 451 U.S. 304, obviated any need for the Court to consider the  
 continuing vitality of that cause of action.

1 to use “solar, wind, geothermal, and biomass . . . alternatives to fossil fuel combustion,” *id.* ¶ 174,  
 2 only by determining that the risks of plaintiffs’ injuries outweighed the multifaceted economic and  
 3 social costs of significantly reducing emissions from defendants’ fossil fuel-fired plants by switching  
 4 to new sources of energy, and the risks that such reductions would be offset by increased emissions  
 5 elsewhere. *See* § I.B., *supra*. Federal common law cannot be invoked to resolve the less complex  
 6 policy issues that underlie questions such as whether to recognize rights of contribution, *Tex. Indus.*,  
 7 451 U.S. at 647, or what standard of care governs advisers to federally-insured thrifts, *O’Melveny &*  
 8 *Myers*, 512 U.S. at 89. *A fortiori*, federal common law cannot be invoked to resolve the far more  
 9 sweeping and fundamental issues raised by plaintiffs’ unprecedented claim that failure to effect a  
 10 wholesale paradigm shift from fossil fuel consumption was tortious. *See Gen. Motors*, 2007 WL  
 11 2726871, at \*12 (similar global warming claim compelled the court “to make the precise initial  
 12 carbon dioxide policy determination[ ] that should be made by the political branches”).

13 The decision in *Massachusetts v. EPA* confirms this. There, EPA argued that it should not  
 14 exercise any regulatory authority that Congress had conferred upon it because, among other things,  
 15 “regulating greenhouse gases might impair the President’s ability to negotiate with key developing  
 16 nations to reduce emissions, and . . . curtailing motor-vehicle emissions would reflect an inefficient,  
 17 piecemeal” response to climate change. 127 S. Ct. at 1463 (internal quotation marks and citation  
 18 omitted). The Court recognized that the judiciary has “*neither the expertise nor the authority to*  
 19 *evaluate these policy judgments.*” *Id.* (emphasis added). *Massachusetts* thus underscores the  
 20 impropriety of expanding the previously recognized federal common law cause of action to  
 21 encompass plaintiffs’ novel claim, because doing so would require the Court to make precisely the  
 22 types of policy judgments it has no authority to make.

23 **C. Any Federal Common Law Cause Of Action That Could Have Possibly**  
 24 **Encompassed Plaintiffs’ Claims Has Been Displaced.**

25 Even apart from the federal courts’ limited authority to recognize or expand federal causes of  
 26 action, legislative action has long since foreclosed such judicial creativity here. Reflecting its  
 27 longstanding aversion to judicial lawmaking, the Supreme Court has explained that, because “it is  
 28 for Congress, not federal courts to articulate the appropriate standards to be applied as a matter of



1 federal law,” courts should adopt a “willingness to find congressional displacement of federal  
 2 common law” whenever “Congress addresses [a] problem formerly governed by federal common  
 3 law.” *Milwaukee II*, 451 U.S. at 317 & n.9, 315 n.8 (emphasis added and deleted); *see also Nat’l*  
 4 *Audubon Soc. v. Dep’t of Water*, 869 F.2d 1196, 1201 (9th Cir. 1988); *United States v. Oswego*  
 5 *Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981) (“separation of powers concerns create a presumption  
 6 in favor of [displacement] of federal common law whenever . . . Congress has legislated on the  
 7 subject”) (emphasis added).<sup>12</sup> For this reason, the Supreme Court held in *Milwaukee II*, that the  
 8 Clean Water Act displaced the federal common law nuisance action last recognized in *Milwaukee I*.  
 9 *See* 451 U.S. at 317. Under *Milwaukee II*, “once Congress has addressed a national concern, our  
 10 fundamental commitment to the separation of powers precludes the courts from scrutinizing the  
 11 sufficiency of the congressional solution” or “holding that the solution Congress chose is not  
 12 adequate.” *Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982). Here, the cause of  
 13 action plaintiffs invoke has been displaced by legislation directly addressing global warming, as well  
 14 as by the President’s implementation of U.S. foreign policy on the subject.

# 15 **1. Legislation addressing greenhouse gases and global warming.**

16 Congress has repeatedly “addressed [the] national concern,” *id.* at 478, of greenhouse gas  
 17 emissions and global warming by adopting a series of laws that “speak directly” to these issues,  
 18 *Milwaukee II*, 451 U.S. at 315. As discussed above, Congress addressed global warming by  
 19 conferring authority to regulate greenhouse gas emissions on EPA; mandating fuel efficiency  
 20 standards; funding development of some of the very technologies that, according to plaintiffs,  
 21 defendants had a tort-based duty to deploy in time to prevent a loss of Arctic sea ice; and mandating  
 22 scientific study and the development of a comprehensive national and international strategy to  
 23 address global warming in a cost-effective manner. *See* § I.C., *supra*. This multi-prong response to  
 24 a global problem is more than sufficient to displace any attempt to use a 100-year old judge-made  
 25 cause of action for “simple type” nuisances to attack global warming on a piecemeal, *ad hoc* and  
 26 indirect manner.

27 <sup>12</sup> We refer to “displacement” of federal common law to avoid confusion with the concept of  
 28 “preemption” of state law, which bars plaintiffs’ state-law claims. *See* § V *infra*.

1 The fact that Congress has not provided remedies for plaintiffs is irrelevant. Just as courts  
 2 cannot deem Congress's response to national problems inadequate when deciding whether to create  
 3 or expand judicially-implied causes of action, they cannot make such judgments when deciding  
 4 whether to *retain* a judicially-implied cause of action.<sup>13</sup> Decisions to create, expand or retain a  
 5 judge-made remedy all require a judgment about what "policy . . . is most advantageous to the  
 6 whole" of society. *Bush v. Lucas*, 462 U.S. 367, 380 (1983) (internal quotation marks omitted).  
 7 Congress has thus far decided that the policy most advantageous to all is a carefully calibrated mix  
 8 of regulatory authority, research, technology development incentives, and multilateral negotiations.  
 9 This Court cannot second-guess that response by converting a cause of action for States to abate  
 10 "simple type" nuisances into a global warming damages remedy for non-state parties.

11 Where, as here, Congress "addresses [a] problem," *Milwaukee II*, 451 U.S. at 315 n.8, courts  
 12 must presume that judicially-created remedies are displaced unless Congress demonstrates a contrary  
 13 intent.<sup>14</sup> Because Congress has demonstrated no such intent here, the federal common law cause of  
 14 plaintiffs invoke (or, more accurately, seek to expand) has been displaced.

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17 <sup>13</sup> See *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943, 947 (9th Cir. 1986) ("where Congress has  
 18 spoken, courts need not pause to evaluate . . . opposing policy arguments . . . [for] Congress has  
 19 struck the balance") (internal quotations omitted; other alterations and omissions in original);  
 20 *Jesinger v. Nev. Fed. Credit Union*, 24 F.3d 1127, 1132 (9th Cir. 1994) ("when Congress has  
 21 legislated on a question that is claimed to be appropriate for the creation of federal common law,  
 22 courts must assume that Congress has articulated all of the governing federal standards") (internal  
 quotations omitted); *Outboard Marine*, 680 F.2d at 478 ("to find that Congress has not 'addressed  
 the question' because it has not enacted a remedy against polluters . . . would be no different from  
 holding that the solution Congress chose is not adequate[, which a court] cannot do").

23 <sup>14</sup> Statutes where Congress demonstrated such an intent can be found in *County of Oneida v. Oneida*  
 24 *Indian Nation*, 470 U.S. 226 (1985), and *United States v. Texas*, 507 U.S. 529 (1993). The statute in  
 25 *County of Oneida* codified a common law rule that Indian property rights cannot be extinguished  
 26 without the consent of the United States, and later statutes "contemplated suits by Indians asserting  
 27 their property rights." *Oneida*, 470 U.S. at 239-40. In that case, Congress made clear that it did not  
 28 intend to displace the very cause of action in which the rule it was codifying would apply. In *Texas*,  
 a statute requiring private debtors to pay interest to the government did not displace the States'  
 federal common law duty to pay pre-judgment interest, because the purpose of the law was "to  
 enhance the Government's debt collection efforts." 507 U.S. at 537-38 (emphasis added).

1           **2. Presidential implementation of foreign policy.**

2           The cause of action plaintiffs assert is also displaced because it conflicts with the President's  
3 implementation of U.S. foreign policy on global warming. As noted above, *see* § I.C., *supra*, the  
4 President believes mandatory U.S. reductions should be offered as a bargaining chip that could  
5 induce comparable restrictions by others. But if U.S. companies are subject to judicially compelled  
6 emissions reductions, the United States has less to offer in exchange for emissions reductions by  
7 other nations. Accordingly, the federal common law cause of action cannot be expanded to  
8 encompass plaintiffs' novel claims, because a "global warming nuisance tort would have an  
9 inextricable effect on . . . foreign policy." *Gen. Motors*, 2007 WL 2726871, at \*13-14; *see also*  
10 *Connecticut*, 406 F. Supp. 2d at 272 (federal common law nuisance claim to address global warming  
11 would require court to "determine and balance the implications of such relief on the United States'  
12 ongoing negotiations with other nations").

13           **IV. PLAINTIFFS' CLAIMS ARE TIME-BARRED.**

14           Finally, plaintiffs' federal claim must also be dismissed because it is time-barred. Plaintiffs'  
15 allegations and the documents they incorporate in their complaint show that they were aware of the  
16 factual basis of their claim no later than December 2003. Because they waited until February 2008  
17 to bring this suit, their claim is barred by the applicable three-year limitations period. Where the  
18 "untimeliness is apparent on the face of the liberally construed complaint," the suit must be  
19 dismissed. *Soliman v. Philip Morris Inc.*, 311 F.3d 966, 971 (9th Cir. 2002).

20           As demonstrated above, no federal common law cause of action encompasses plaintiffs'  
21 claims. But if one did, it would be governed by California's statute of limitations under the  
22 "borrowing" rule that applies when Congress fails to provide a limitations period for a statutory  
23 cause of action. *Barajas v. Bermudez*, 43 F.3d 1251, 1255-56 (9th Cir. 1994); *see also N. Star Steel*  
24 *Co. v. Thomas*, 515 U.S. 29, 35 (1995). California requires an "action for trespass upon or injury to  
25 real property" to be brought within "three years." Cal. Civ. Proc. Code § 338(b).<sup>15</sup> That limitations

26  
27 <sup>15</sup> Nor is either plaintiff exempt from statutes of limitations by virtue of its status. The City of  
28 Kivalina is a municipality, not a State, and thus is subject to statutes of limitations to the same extent  
as a private party. *See Guar. Trust Co. of N.Y. v. United States*, 304 U.S. 126, 135 n.3 (1938); *San*  
*Marcos Water Dist. v. San Marcos Unified Sch. Dist.*, 190 Cal. App. 3d 1083, 1087 (1987); *see also*

(Footnote continued)

1 period “begins to run upon creation of the nuisance.” *Mangini v. Aerojet-Gen. Corp.*, 912 P.2d  
 2 1220, 1223 (Cal. 1996).<sup>16</sup> If a plaintiff cannot immediately discover the basis for the claim, it begins  
 3 to run when the plaintiff “has reason at least to suspect a factual basis for [the claim’s] elements.”  
 4 *Norgart v. Upjohn Co.*, 981 P.2d 79, 88 (Cal. 1999).

5 The complaint makes clear that plaintiffs were on notice of the elements of their claim at  
 6 least four years before they filed suit in February 2008. Plaintiffs allege that the atmospheric effects  
 7 of greenhouse gases such as those emitted by defendants have been known for decades. Compl.  
 8 ¶¶ 132-155. They also had reason to understand the alleged effects of global warming on their  
 9 island, and the need to relocate, as early as 2003. Indeed, their allegations on these subjects are  
 10 drawn directly from a December 2003 report by the Government Accountability Office. *See id.*  
 11 ¶ 185 (citing Gov’t Accountability Office, *Alaska Native Villages* (Dec. 2003), available at  
 12 <http://www.gao.gov/new.items/d04142.pdf> (“GAO Report”)). That 2003 report states that “[r]ising  
 13 temperatures have . . . affected the thickness, extent, and duration of sea ice that forms along

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14 n.8, *supra*. Finally, although California Civil Code § 3490 provides that “[n]o lapse of time can  
 15 legalize a public nuisance,” that provision applies only to “action[s] brought by a public entity to  
 16 abate a public nuisance,” not to damages suits like this one. *Mangini v. Aerojet-Gen. Corp.*, 230  
 17 Cal. App. 3d 1125, 1142-43 (1991) (emphasis added), *aff’d*, 912 P.2d 1220 (Cal. 1996); *Beck Dev.*  
 18 *Co. v. S. Pac. Transp. Co.*, 44 Cal. App. 4th 1160, 1216 (1996); *see also* Donald G. Gifford, *Public*  
 19 *Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 781-82 (2003).

20 <sup>16</sup> Although California recognizes an exception for “continuing” nuisances, that exception applies  
 21 only where the nuisance can be readily abated. *See Mangini*, 912 P.2d at 1229. Here, plaintiffs  
 22 allege that they must relocate due to the loss of critical sea ice, Compl. ¶¶ 184-187, and they  
 23 nowhere allege that greenhouse gas concentrations, rising temperatures or loss of sea ice can be  
 24 abated in any way that would avoid their alleged relocation costs. To the contrary, documents  
 25 incorporated in their complaint—which the Court may consider in ruling on a motion to dismiss, *see*  
 26 *Ritchie*, 342 F.3d at 907-08—state that greenhouse gases “will remain elevated above natural levels  
 27 for centuries, even if emissions were to cease immediately,” *Impacts of a Warming Arctic: Arctic*  
 28 *Climate Impact Assessment* 9 (2004), available at <http://www.amap.no/acia>, cited in Compl. ¶ 184,  
 and that “climate-induced environmental changes cannot be reversed quickly, if at all, due to the  
 long time-scales associated with the climate system.” IPCC Working Group II, Intergovernmental  
 Panel on Climate Change, *IPCC Second Assessment: Climate Change 1995* at 28 (1995), available  
 at <http://www.ipcc.ch/pdf/climate-changes-1995/ipcc-2nd-assessment/2nd-assessment.en.pdf>, cited  
 in Compl. ¶ 155. Because the alleged nuisance cannot be readily abated, it is considered a  
 “permanent nuisance,” and plaintiffs were required to “bring one action for all past, present and  
 future damage within three years” after the alleged nuisance was created. *Baker v. Burbank-*  
*Glendale-Pasadena Airport Auth.*, 705 P.2d 866, 869 (Cal. 1985).

[Alaska's] western and northern coasts," leaving those coasts "more vulnerable to waves, storm surges, and erosion," and leaving Kivalina "in imminent danger from flooding and erosion." GAO Report at 4, 8; *cf.* Compl. ¶ 185. The complaint quotes the report for the proposition that, at the time the report was issued *in 2003*, "[r]emaining on the island . . . [wa]s no longer a viable option for the community.'" Compl. ¶ 185 (quoting GAO Report at 32). Kivalina, the report stated, was already "making plans to relocate," and "working with relevant federal agencies to locate suitable new sites." GAO Report at 4, 27-29. Indeed, according to the report, "[r]elocation ha[d] been a topic of discussion and study for Kivalina . . . for at least two decades." *Id.* app. VIII, at 78. Plaintiffs thus "had reason at least to suspect a factual basis" for their claims no later than December 2003, but failed to file this suit until more than four years later, in February 2008. Consequently, their federal claim is time-barred (and their state-law claim is as well).<sup>17</sup>

\* \* \*

In short, plaintiffs can state no federal claim for relief. Because this Court must dismiss plaintiffs' putative federal claim, the Court need go no further. It may decline jurisdiction over the remaining state-law counts under 28 U.S.C. § 1367(c)—and must do so if the federal claim is dismissed for clear want of subject-matter jurisdiction. *See Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 421 (9th Cir. 1991); *Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 806 (9th Cir. 2001). If the Court disposes of the federal claim on non-jurisdictional or prudential grounds, however, it retains "discretion . . . to adjudicate the remaining [state-law] claims." *Teddy Bear*, 254 F.3d at 806. Here, the defects that doom plaintiffs' state-law claims are often closely related to the

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<sup>17</sup> Plaintiffs' state-law nuisance claim is time-barred for the same reasons. Because this suit was filed in California, California's choice-of-law rules determine which State's statute of limitations applies. *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1164 (9th Cir. 1996). Those rules "generally lead[] California courts to apply California law" to statute-of-limitations issues, especially where its limitations period bars a claim. *Deutsch v. Turner Corp.*, 324 F.3d 692, 716-17 (9th Cir. 2003) (citations omitted). California "has a substantial interest in preventing the prosecution in its courts of claims which it deems to be stale," *id.* at 717 (quotation marks omitted), and nothing overrides that interest here. Plaintiffs chose to file in California; and California's borrowing statute, Cal. Civ. Proc. Code § 361, requires courts to apply the *shorter* of California's statute or the applicable foreign statute. Because California's statute bars plaintiffs' claims, however, there is no need to consider any other State's limitations period. By arguing for application of California's statute of limitations, defendants do not concede that California law applies to other issues, such as plaintiffs' substantive claims. *See* n. 20, *supra*.

1 issues that plague their federal claim. Having invested significant resources in evaluating and  
 2 addressing the federal claim, this Court could exercise its discretion in the interests of convenience,  
 3 fairness and judicial economy to address and dispose of the related state-law counts as well.  
 4 Accordingly, we address the defects in the state-law claims below.

## 5 **V. PLAINTIFFS' STATE-LAW CLAIMS ARE PREEMPTED.**

6 Plaintiffs' state-law claims are preempted for many of the same reasons that their federal  
 7 claim is barred by the principles of displacement and the political question doctrine. Massive state-  
 8 law damage awards would frustrate and conflict with Congress' intent to fashion a uniform,  
 9 coordinated, and comprehensive approach to global climate change, and with the President's  
 10 implementation of U.S. foreign policy. *See Pub. Util. Dist. No. 1 v. IDACORP Inc.*, 379 F.3d 641,  
 11 649-50 (9th Cir. 2004) ("‘conflict preemption’ exists ‘if there is an actual conflict between federal  
 12 and state law, or where compliance with both is impossible’") (quoting *Gadda v. Ashcroft*, 363 F.3d  
 13 861, 871 (9th Cir. 2004)). Moreover, global climate change is predominantly a matter of federal  
 14 concern and cannot be addressed in any meaningful manner by varied state-law mandates.

### 15 **A. Plaintiffs' State-Law Claims Conflict With The Force Or Purpose Of** 16 **Congressional Enactments on Global Climate Change.**

17 Plaintiffs' state-law claims are preempted because they interfere with and frustrate the  
 18 method chosen by Congress for addressing global climate change. In *Geier v. American Honda*  
 19 *Motor Co.*, 529 U.S. 861 (2000), for example, the Court found that a state tort action was preempted  
 20 because it would frustrate the federal scheme for passive restraints in automobiles. The suit in that  
 21 case was predicated on the theory that manufacturers had a duty, under state tort law, to install  
 22 airbags. But the Court held that claim preempted because such a duty "would have presented an  
 23 obstacle to the variety and mix of [other] devices that the federal regulation sought." *Id.* at 881.

24 So too here, any state-law damages award would necessarily be premised on a finding that a  
 25 defendant had exceeded some "acceptable" or "reasonable" cap on emissions, thus forcing each such  
 26 defendant to reduce emissions to that level to avoid additional damage awards. *See Gen. Motors*,  
 27 2007 WL 2726871, at \*8 (noting that case brought by California against car manufacturers seeking  
 28 damages for alleged contributions to global climate change "would require the Court to create a



quotient or standard” for carbon dioxide emissions). Such a “lawsuit cap,” however, would conflict with Congress’s method of addressing climate change. As discussed above, Congress has ordered a careful phasing-in of one type of emissions cap (for automobiles) and has conferred authority on an expert and politically accountable agency to determine whether and how to regulate greenhouse gas emissions. *See* § I.B., *supra*. Congress has repeatedly confirmed, moreover, that climate change must be addressed on a comprehensive, national basis, that includes negotiations with other nations.<sup>18</sup> *Ad hoc* state tort damage awards, therefore, plainly frustrate Congress’s decision to develop a coordinated, comprehensive national scheme in which Congress itself, or a federal agency exercising congressionally delegated authority, fashions appropriate emissions limits.

Moreover, in light of the futility of state-specific responses, there is simply no role for state law in regulating activities that might lead to global climate change. Certain areas are so uniquely federal in nature that state law is preempted even in the absence of any conflict with federal law. *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (foreign affairs); *Chy Lung v. Freeman*, 92 U.S. 275, 279-80 (1875) (immigration); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507-08 (1988) (liability of government contractors). Mandatory regulation of activities to address global climate change necessarily falls into this category. Only the federal government can, through national legislation and international negotiations, compel meaningful reductions—*i.e.*, reductions coupled with protections against offsetting increased emissions elsewhere.

The decision in *Massachusetts* confirms the uniquely federal nature of any response to global warming. The Court observed that “Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted.” 127 S. Ct. at 1454. The “sovereign prerogatives” necessary to address

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<sup>18</sup> *See* 15 U.S.C. § 2938(b)(1) (research findings to be provided to EPA so it can develop “a coordinated *national* policy on global climate change”) (emphasis added); 42 U.S.C. § 13389(c)(1) (calling for a “*national* strategy to promote the deployment and commercialization” of technologies to reduce greenhouse gas intensity) (emphasis added); 151 Cong. Rec. S7033, S7033 (daily ed. June 22, 2005) (resolution calling for “comprehensive and effective *national* program” that “will not significantly harm the United States economy” and “will encourage comparable action by other nations”) (emphasis added).



the problem “are now lodged in the *Federal Government*.” *Id.* (emphasis added). Absent explicit authorization from Congress, state tort law cannot redress a global phenomenon that affects billions of people and can be resolved only through coordinated national and international measures.<sup>19</sup>

**B. Plaintiffs’ State-Law Claims Conflict With And Impermissibly Undermine The Nation’s Foreign Policy Approach To Global Climate Change.**

Plaintiffs’ state-law nuisance claim is also preempted because it would undermine the nation’s foreign policy approach to global climate change. As discussed above, *see* § I.C., *supra*, federal policy seeks *multilateral* reductions, *see, e.g.*, Pub. L. No. 100-204, tit. XI, § 1102(5), 101 Stat. at 1408 (codified at 15 U.S.C. § 2901 note) (any response to global climate change “will require vigorous efforts to achieve international cooperation”), in order to ensure that U.S. businesses and consumers are not subjected to significant costs with no corresponding benefit if other nations let their emissions significantly increase. *See Control of Emissions*, 68 Fed. Reg. at 52931; H.R. Rep. No. 102-474, pt. I, at 152, *reprinted in* 1992 U.S.C.C.A.N. at 1975 (requiring “dramatic and possibly higher cost [responses to global warming] . . . *only in the context of concerted international action*”) (emphasis added). And the President believes the prospect of mandatory U.S. emissions limits is a bargaining chip to be offered in exchange for limits by others.

State tort actions interfere with each aspect of this policy. The coercive impact of the massive damages award plaintiffs seek is designed to compel the adoption of *unilateral* emission standards. This gives the President “less to offer” other countries, and thus “less . . . diplomatic leverage,” than Congress intended. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 377 (2000). And it creates precisely the risk of significant costs without corresponding benefits that federal policy seeks to avoid. Plaintiffs’ state-law claims thus “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” *id.* at 373 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)), and are therefore preempted.

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<sup>19</sup> A State cannot use its tort law to govern out-of-state conduct. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996) (no state may use tort system “as a means of imposing its regulatory policies on the entire Nation”).

## VI. PLAINTIFFS CANNOT STATE VALID STATE-LAW CLAIMS.

Plaintiffs' state-law claims must also be dismissed because they cannot establish essential elements of a nuisance, including breach of a cognizable duty, proximate causation, and unique injury. They have also failed to state any viable concert-of-action theory.

### A. Plaintiffs Cannot State Valid Nuisance Claims.

No matter which state law applies, a nuisance claim is a type of tort. *See* Restatement (Second) of Torts § 822 cmt. a (nuisance is a form of tort liability); *see also Tint v. Sanborn*, 211 Cal. App. 3d 1225, 1233 n.1 (1989) ("nuisance is an older tort than negligence") (quotation marks omitted); *Parks Hiway Enters. LLC v. CEM Leasing, Inc.*, 995 P.2d 657, 667 (Alaska 2000).<sup>20</sup> Thus, as with other torts, proximate causation and duty are essential elements of a nuisance claim. *See Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696, 706 (9th Cir. 2001) (dismissing common law claims, including nuisance, for lack of proximate cause); *DeNardo v. Corneloup*, 163 P.3d 956, 961 (Alaska 2007) (nuisance liability requires breaching a duty of care);

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<sup>20</sup> Plaintiffs have failed to specify the state law under which they are suing, which is itself a reason to dismiss the complaint. *See, e.g., In re Ditropan XL Antitrust Litig.*, 529 F. Supp. 2d 1098, 1101 (N.D. Cal. 2007) (dismissing complaint because "ability to plead a claim for unjust enrichment may vary from state to state, and unless and until . . . Plaintiff clarifies under what state law it is moving, neither Defendants nor the Court can address whether the claim or claims have been adequately plead"); *see also In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 07-cv-1819, 2008 WL 426522 (N.D. Cal. Feb. 14, 2008). Here, the complaint premises liability for alleged real property injuries in Alaska based on the release of carbon dioxide incident to defendants' operation of power electric generation facilities in many other States. This case thus gives rise to difficult choice-of-law issues. Indeed, although atmospheric carbon dioxide is not a noxious compound traceable to these defendants, the Court could have to grapple with the laws of at least 33 different States, depending on how those choice-of-law issues are resolved. *Cf. Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 487 (1987) (holding that state-law claim concerning interstate water pollution subject to the federal Clean Water Act and originating from a single, identifiable point source is governed by the law of the State in which the source is located); *North Carolina ex rel. Cooper v. TVA*, --- F. Supp. 2d ---, 2008 WL 553240, at \*3 (W.D.N.C. Feb. 27, 2008) (similar under Clean Air Act). The potential for these claims to become an intractable morass under the laws of so many different States reflects the overarching difficulty discussed above—that the national and international issues of high policy at the heart of this suit are not well-suited to judicial, as opposed to legislative, resolution. In any event, defendants reserve the right to raise choice-of-law issues at a later stage but, for purposes of this motion, limit their arguments to certain core legal requirements identified by the Restatement and followed in most States, including California and Alaska. Should any part of this action continue past this initial motion to dismiss, the complex choice-of-law issues inherent in plaintiffs' claims will have to be addressed.

1 *Martinez v. Pac. Bell*, 225 Cal. App. 3d 1557, 1565-66 (1990) (nuisance liability extends only to  
 2 damage proximately caused by defendant's conduct); 58 Am. Jur. 2d *Nuisance* § 9 (2002). Plaintiffs  
 3 cannot establish either of these essential elements.<sup>21</sup> Their complaint also fails to establish the basic  
 4 elements of nuisance as set forth in the Restatement, such as the requirement of a unique injury.

5 **1. Plaintiffs cannot establish a duty.**

6 There is no cognizable duty, under any State's law, to limit the emission of carbon dioxide  
 7 during the legal production of electricity so as to avoid contributing to the phenomenon of global  
 8 warming and the alleged melting of the Arctic sea ice abutting the shores of Alaskan coastal villages.  
 9 Plaintiffs in other global warming cases have invoked the principle that a party can be liable for  
 10 contributing to a nuisance even where the contribution is "relatively slight" and "by itself would not  
 11 be . . . unreasonable." Restatement (Second) of Torts § 840E cmt. b. *See* note 5, *supra*. But, as  
 12 discussed above, *see* § I.A., *supra*, this standard cannot apply in the case of global warming.

13 The reasons are straightforward. In determining whether a defendant owes a duty of care to a  
 14 plaintiff, courts assess the following factors: (1) foreseeability of harm to the plaintiff; (2) degree of  
 15 certainty that the plaintiff suffered injury; (3) closeness of the connection between the defendant's  
 16 conduct and the injury suffered; (4) moral blame attached to the defendant's conduct; (5) policy of  
 17 preventing future harm; (6) extent of the burden to the defendant and consequences to the  
 18 community of imposing a duty to exercise care with resulting liability for breach; and (7)  
 19 availability, cost, and prevalence of insurance for the risk involved. *See e.g., Rowland v. Christian*,  
 20 69 Cal. 2d 108, 112-13 (1968); *D.S.W. v. Fairbanks N. Star Borough Sch. Dist.*, 628 P.2d 554, 555  
 21 (Alaska 1981). Many of the same factors that preclude adjudication of this lawsuit under the  
 22 political question and standing doctrines likewise prevent this Court from resolving the subsidiary  
 23 issues necessary to find that defendants owed plaintiffs any duty to limit their carbon dioxide  
 24 emissions.

25  
 26 <sup>21</sup> Questions of duty and proximate cause are both questions of law for a court to decide. *See*  
 27 *DeNardo*, 163 P.3d at 961 (whether there is a duty of care is a question of law); *Weirum v. RKO*  
 28 *Gen., Inc.*, 15 Cal. 3d 40, 46 (1975) (same); *Benefiel v. Exxon Corp.*, 959 F.2d 805, 808 (9th Cir.  
 1992) ("where causation cannot reasonably be established under the facts alleged by a plaintiff, the  
 question of proximate cause is one for the court" under both federal and California law).

At the threshold, the remoteness of plaintiffs’ alleged harm in northwest Alaska from defendants’ conduct in other States, and the many intervening forces that coalesced to cause their alleged injuries—including the myriad other emissions of greenhouse gases, the timing and extent of ice barrier formations, the frequency and extent of winter storms, and the erosion of plaintiffs’ coastal property—foreclose any findings that plaintiffs’ alleged injuries were a foreseeable result or sufficiently connected to defendants’ lawful generation of electricity. Nor can the Court assign “moral blame” to these defendants without making the numerous and fundamental policy judgments that necessarily underlie any determination that certain levels of carbon dioxide emissions by electricity providers are unreasonable. These are the very policy judgments that render plaintiffs’ claims nonjusticiable.

Finally, questions inherent in articulating and implementing the duty that plaintiffs ask this Court to create demonstrate that any such duty is unworkable. Not only would the Court have to determine permissible levels emissions of carbon dioxide to define the duty, but it would also have to determine who is subject to the duty and to whom the duty is owed. Because of the very nature of global warming as set forth in the complaint, *everyone* in the world contributes to it and *everyone* in the world is affected by it. Imposing tort duties in a case such as this either would mean everyone is liable to everyone else, or would require drawing lines limiting which contributors should be liable and which affected parties can recover, once again immersing the Court in the very policy judgments that are exclusively the province of the political branches. *See* § I.C *supra*. Thus, in addition to demonstrating that this case raises nonjusticiable political questions, these realities also establish that plaintiffs cannot show a breach of any legally cognizable duty.<sup>22</sup>

## **2. Plaintiffs cannot establish proximate causation.**

Where injuries are too remote from the alleged wrongful conduct, a plaintiff cannot establish proximate causation. *See In re Exxon Valdez*, 270 F.3d 1215, 1253 (9th Cir. 2001) (“the requirement

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<sup>22</sup> This is particularly true given that District Courts have been directed to reject unprecedented and novel legal theories when applying state law. *See Young v. Aeroil Prods. Co.*, 248 F.2d 185, 188 (9th Cir. 1957) (when interpreting California law, “Our task is not to innovate, but to imitate”); *Doleman v. Meiji Mut. Life Ins. Co.*, 727 F.2d 1480, 1484 (9th Cir. 1984) (same); *see also In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 379 F. Supp. 2d 348, 363 (S.D.N.Y. 2005) (federal courts should not adopt novel legal theories when applying state law).

of proximate cause bars remote and speculative claims.”); *Benefiel v. Exxon Corp.*, 959 F.2d 805, 807 (9th Cir. 1992) (affirming dismissal where alleged injuries were “remote and derivative” and defendants’ conduct “did not directly cause any injury”); *see also Ass’n of Wash. Pub. Hosp. Dists.*, 241 F.3d at 706. Proximate cause refers generally to “the judicial tools used to limit a person’s responsibility for the consequences of that person’s own acts.” *Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957, 963 (9th Cir. 1999). Among those tools is the requirement that there be some “direct relationship between the injury and the alleged wrongdoing.” *Id.* (citing *Holmes*, 503 U.S. 258, 269 (1992)). The requirements of proximate cause and direct injury clearly apply to nuisance claims. *See Ass’n of Wash. Pub. Hosp. Dists.*, 241 F.3d at 706 (affirming dismissal of common law claims including nuisance for lack of proximate cause); Restatement (Second) Torts § 834 cmt. d (“When a person is only one of several persons participating in carrying on an activity, his participation must be substantial before he can be held liable for the harm resulting from it. This is true because to be a legal cause of harm a person’s conduct must be a substantial factor in bringing it about.”); *id.* § 431. Thus, if a plaintiffs’ injuries are too remote from the alleged wrongful conduct, courts will not find nuisance liability.

Injuries are too remote if they can be connected to the alleged wrongful conduct only by multiple links in an attenuated chain of causation. *Benefiel*, 959 F.2d at 807 (referring to “uniformly accepted principles of tort law which require a plaintiff to prove more than that the defendant’s action triggered a series of other events that led to the alleged injury”). As Prosser & Keeton explain:

[T]he consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would set society on edge and fill the courts with endless litigation.

W. Page Keeton, *Prosser & Keeton on Torts*, § 41, at 264 (5th ed. 1984) (quotation marks omitted). Consequently, plaintiffs cannot recover if there are simply too many links in the causal chain between the alleged wrongdoing and injury; if the chain of causation is too attenuated, courts will hold that the alleged injuries are, as a matter of law, too indirect to permit recovery. Just as the highly attenuated causal chain necessary to link plaintiffs’ alleged injuries to defendants’ conduct

precludes a finding of Article III standing, *see* § II.B, that same causal chain is too lengthy to permit a finding of proximate cause.

The Restatement confirms that plaintiffs’ alleged injuries are too remote here. The Restatement recognizes that proximate cause requires a showing that a defendant’s conduct was a “substantial” factor in bringing about the alleged harm. Restatement (Second) of Torts § 431. “Whether conduct is a ‘substantial factor in bringing about harm’ depends in part on whether ‘the actor’s conduct . . . has created a situation harmless unless acted upon by other forces for which the actor is not responsible.’” *Benefiel*, 959 F.2d at 807 (omission in original) (quoting Restatement (Second) of Torts § 433(b)). Here, defendants’ emissions are harmless in and of themselves, and plaintiffs’ injuries allegedly arose only because of the aggregated effects of innumerable emissions from around the world and over the course of centuries—an aggregation for which defendants are not responsible. Because plaintiffs cannot establish proximate causation, their state nuisance claim should be dismissed.

### 3. Plaintiffs do not allege a unique injury.

Plaintiffs’ nuisance claim also fails because they have not alleged that they suffered a unique injury—a requirement for a private plaintiff bringing a public nuisance claim. To recover damages in an individual action for public nuisance, plaintiffs must have suffered harm of a different kind from that suffered by other persons exercising “the right common to the general public that was the subject of interference.” Restatement (Second) of Torts § 821C(1); *see also In re Burbank Env’tl. Litig.*, 42 F. Supp. 2d 976, 984 (C.D. Cal. 1998) (“To state a claim for public nuisance, a private citizen must allege injuries different in kind than injuries to the general public.”).

The injuries plaintiffs allege (erosion, flooding, etc.) are not unique to Kivalina, but, according to plaintiffs, are common to native Alaskan coastal villages.<sup>23</sup> *See* GAO Report at 2-3

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<sup>23</sup> Numerous cases addressing the special injury issue demonstrate that it is appropriate to consider a specific community, such as similarly-situated Alaskan villages, rather than a larger population, such as all of Alaska or even all of the United States, as the “public” at issue. *See, e.g., Koll-Irvine Ctr. Prop. Owners Assoc. v. County of Orange*, 24 Cal. App. 4th 1036, 1041 (1994) (affirming dismissal of nuisance claims where, plaintiffs, property owners near an airport with allegedly hazardous fuel tanks, did not allege a unique injury because their injuries were the same as those suffered by “all the homes and businesses in the area of the airport.”); *532 Madison Ave. Gourmet Foods, Inc. v.*

(Footnote continued)



(“184 of 213 or 86.4 percent of Alaska Native villages experience some level of flooding and erosion”), *cited in* Compl. ¶¶ 185, 186. An argument that erosion or flooding at Kivalina is more extreme or is occurring at a faster rate than in other Alaskan villages will not save plaintiffs’ claim: they must show a harm different in *kind*. Differences in *degree* are not sufficient to establish special injury. Restatement (Second) Torts § 821C cmt. b; *see also In re Exxon Valdez*, No. A89-0095-CV (HRH), 1994 WL 182856, at \*2 (D. Alaska Mar. 23, 1994) (“The Alaska Natives do not have a viable, maritime, public nuisance claim, as their claim is only different in degree, but not in kind, from that suffered by the general population of Alaska”). Because plaintiffs have not alleged a special injury that is different in both kind and degree from that suffered by others exercising the same public right, they cannot make out a claim for public nuisance.<sup>24</sup>

#### **B. Plaintiffs’ Concert-of-Action Claim Fails As A Matter Of Law.**

Plaintiffs’ concert-of-action claim also must be dismissed. That claim is dependent on the underlying substantive tort and thus must be dismissed once the nuisance claim is dismissed. The complaint in any event falls well short of alleging a viable concert-of-action theory.

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*Finlandia Ctr., Inc.*, 750 N.E.2d 1097, 1105 (N.Y. 2001) (affirming dismissal of nuisance claim due to lack of unique injury by plaintiffs whose businesses lost money during street closures caused by a construction accident because “every person who maintained a business, profession or residence in the heavily populated areas of Times Square and Madison Avenue was exposed to similar economic loss during the closure periods”).

<sup>24</sup> If this case were to proceed to a point where the Court must engage in a choice-of-law analysis, *see*, n.20, *supra*, there will likely be other nuisance-specific arguments that bar plaintiffs’ claims. For example, many jurisdictions, including Alaska, require that a plaintiff allege that the defendants controlled the nuisance. *See, e.g., Parks Hiway*, 995 P.2d at 666 (“liability for damage caused by a nuisance turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance”). In this case, defendants control, at most, the source of their own emissions. But emissions alone are not the nuisance plaintiffs allege. Instead, the alleged nuisance is the global warming allegedly caused by the *accumulation* of countless emissions from around the world over the course of decades and even centuries, and the loss of Arctic sea ice allegedly caused by global warming. *See* Compl. ¶ 185 (“[r]ising temperatures caused by global warming have affected the thickness, extent and duration of sea ice that forms along Kivalina’s coast. Loss of sea ice . . . leaves Kivalina’s coast more vulnerable to waves, storm surges and erosion. Storms now routinely batter Kivalina and are destroying its property to the point that Kivalina must relocate or face extermination.”). But neither loss of Arctic Sea ice, nor the climate change that allegedly leads to such loss, is within defendants’ control.



**1. Concert of action is not an independent tort.**

Properly understood, concert of action merely describes two theories of secondary liability—conspiracy and aiding and abetting. *See Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983). Concert of action thus is not an independent tort. It is, at most, a basis for imposing liability on someone other than the primary tortfeasor. *See E. Trading Co. v. Refco, Inc.*, 229 F.3d 617, 623 (7th Cir. 2000) (“there is no tort of aiding and abetting”; rather, it is “a basis for imposing [tort] liability”); *Halberstam*, 705 F.2d at 479 (“Since liability for civil conspiracy depends on performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort.”); *Cadlo v. Owens-Illinois, Inc.*, 125 Cal. App. 4th 513, 521 (2004) (“Concert of action is a theory of group liability.”).

Because plaintiffs cannot assert an actionable, underlying tort, their concert-of-action claim cannot survive. *See, e.g., Wynn v. Nat’l Broad. Co.*, 234 F. Supp. 2d 1067, 1114 (C.D. Cal. 2002) (dismissing aiding-and-abetting claim where complaint failed to establish an underlying tort); *In re Lupron Mktg. & Sales Practices Litig.*, No. 01-cv-10861, 2004 WL 2070883, at \*5 (D. Mass. Sept. 16, 2004) (same result following dismissal or waiver of underlying tort claims); *FDIC v. S. Prawer & Co.*, 829 F. Supp. 453, 457 (D. Me. 1993) (same result because plaintiff had “not alleged an independent tort to which aiding and abetting liability c[ould] attach”). “The unifying principle under either . . . civil conspiracy or aiding and abetting[] is that . . . liability depends upon the actual commission of a tort.” *Richard B. LeVine, Inc. v. Higashi*, 131 Cal. App. 4th 566, 574 (2005).

**2. The complaint does not properly plead concert of action.**

In any event, plaintiffs have failed to plead a proper concert-of-action claim. Section 876 of the Restatement divides concert of action into three clauses. Restatement (Second) of Torts § 876, at 315. Clause (a) addresses actions undertaken “pursuant to a common design,” which most courts treat as equivalent to civil conspiracy. *See, e.g., Halberstam*, 705 F.2d at 477. Clauses (b) and (c) address actions that, among other requirements, provide “substantial assistance” to otherwise tortious activities, which courts treat as equivalent to civil aiding and abetting. *See, e.g., Wynn*, 234

1 F. Supp. 2d at 1114. Even if one assumes that those theories could be asserted under relevant law,<sup>25</sup>  
 2 the complaint falls short of establishing either one.

3 A boilerplate recitation of the elements identified by the Restatement is not sufficient. Rule 8  
 4 of the Federal Rules of Civil Procedure requires “more than labels and conclusions, and a formulaic  
 5 recitation of the elements of a cause of action.” *Twombly*, 127 S. Ct. at 1964-65. To avoid  
 6 dismissal, the complaint must allege facts sufficient “to raise a right to relief above the speculative  
 7 level.” *Id.* at 1965; *see id.* at 1966 (holding that “an allegation of parallel conduct and a bare  
 8 assertion of conspiracy will not suffice” to allege a § 1 claim under the Sherman Act); *see also*  
 9 *Impac Warehouse Lending Group v. Credit Suisse First Boston, LLC*, No. 06-56024, 2008 WL  
 10 731050, at \*1 (9th Cir. Mar. 17, 2008) (in light of *Twombly*, allegations that defendants  
 11 “‘knowingly, and willfully agreed and conspired’” to engage in fraud, without any “facts supporting  
 12 the existence of an agreement,” were insufficient to state a claim for conspiracy under Rule 8(a)  
 13 notice pleading standards).

14 Plaintiffs offer precisely the sort of “formulaic recitation” that *Twombly* forbids. Their  
 15 concert-of-action allegations simply parrot, nearly verbatim, § 876 of the Restatement without any  
 16 supporting factual allegations. *Compare* Compl. ¶¶ 279-282, *with* Restatement (Second) of Torts  
 17 § 876. The complaint thus offers *no facts* to suggest that defendants had a “tacit understanding” or a  
 18 “common plan” to accomplish a tortious result—as § 876(a) requires. *See, e.g., Sindell v. Abbott*  
 19 *Labs.*, 607 P.2d 924, 932 (Cal. 1980); *Pittman by Pittman v. Grayson*, 149 F.3d 111, 122-23 (2d Cir.  
 20 1998).<sup>26</sup> Nor does it identify how any defendant “‘substantially assisted’” any other defendant’s

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21  
 22 <sup>25</sup> With respect to the federal claims, there is some doubt that a “substantial assistance” concert-of-  
 23 action claim—*i.e.*, aiding and abetting—can be asserted at all. The Supreme Court has described  
 24 that doctrine as “at best uncertain in application . . . [T]he leading cases applying this doctrine are  
 25 statutory securities cases, with the common-law precedents ‘largely confined to isolated acts of  
 26 adolescents in rural society.’” *Cent. Bank of Denver*, 511 U.S. at 181 (citing *Halberstam*, 705 F.2d  
 at 489). The actions of defendants here fall into neither category. With respect to the state-law  
 claims, plaintiffs have not identified which State’s law would apply, but their concert-of-action  
 allegations do not meet the minimal requirements that would be applied by any State.

27 <sup>26</sup> Plaintiffs do allege in their Third Claim for Relief that *certain* defendants engaged in a civil  
 28 conspiracy “to mislead the public with respect to the science of global warming and to delay public  
 awareness of the issue,” Compl. ¶ 269, by, for example, “funding and use of ‘global warming

(Footnote continued)

1 tortious conduct as required by § 876(b) and (c). *See, e.g., Chance World Trading, E.C. v. Heritage*  
 2 *Bank of Commerce*, 438 F. Supp. 2d 1081, 1084 (N.D. Cal. 2005), *aff'd*, 263 F. App'x 630 (9th Cir.  
 3 2008). The complaint is bereft of any allegation of even a *single active step* by any one defendant to  
 4 facilitate another defendant's emissions. Mere knowledge of another's conduct (and failure to  
 5 prevent it) cannot establish concert of action. *See, e.g., Davidson v. City of Westminster*, 649 P.2d  
 6 894, 897 (Cal. 1982); *Fiol v. Doellstedt*, 50 Cal. App. 4th 1318, 1326 (1996); *Ellison v. Plumbers &*  
 7 *Steamfitters Union Local 325*, 118 P.3d 1070, 1077-78 (Alaska 2005). And "'parallel or imitative'"  
 8 conduct is likewise insufficient. *See In re Related Asbestos Cases*, 543 F. Supp. 1152, 1159 (N.D.  
 9 Cal. 1982).

10 Even before *Twombly*, courts regularly dismissed concert-of-action claims where the  
 11 complaint, like the one here, merely transcribed the Restatement but alleged no facts supporting the  
 12 elements. In *Wynn*, 234 F. Supp. 2d at 1115, for example, the plaintiff had failed to allege that a  
 13 particular defendant had "acted in any specific way to aid" any other identified person in  
 14 perpetrating the tort. Because of that omission, the concert-of-action claim "fail[ed] to provide" the  
 15 defendants with "adequate notice of the alleged wrongdoing" that Rule 8 requires. *Id.*; *see In re*  
 16 *Textainer P'ship Sec. Litig.*, No. C-05-0969, 2005 WL 3801596, at \*16 (N.D. Cal. Dec. 12, 2005)  
 17 (dismissing for failure to allege "facts to support an inference" of "knowledge" or substantial  
 18 assistance); *Scognamillo v. Credit Suisse First Boston LLC*, No. C03-2061, 2005 WL 2045807, at \*5  
 19 (N.D. Cal. Aug. 25, 2005) (similar), *aff'd*, 254 F. App'x 669 (9th Cir. 2007); *Shulz v. Neovi Data*  
 20 *Corp.*, 152 Cal. App. 4th 86, 97 (2007) (failure to allege "facts showing 'substantial assistance or  
 21 *encouragement'"); Cadlo*, 125 Cal. App. 4th at 522 (similar). For the same reasons, the concert-of-  
 22 allegations are inadequate and dismissal is likewise required here.

### 23 CONCLUSION

24 For all of the foregoing reasons, plaintiffs' federal claim and their state-law nuisance and  
 25 concert-of-action claims should be dismissed with prejudice.

26  
 27  
 28 skeptics." *Id.* ¶ 191. But, based on the language in the complaint itself, we presume that the Fourth  
 Claim for relief, which implicates *all* defendants, is not an expansion of that earlier claim.

1 Dated: June 30, 2008

Respectfully submitted,

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**ATTESTATION OF SIGNATURE**  
**(N.D. Cal. General Order 45)**

I, Samuel R. Miller, hereby attest that concurrence in the filing of **UTILITY DEFENDANTS' MOTION TO DISMISS** has been obtained from all of the signatories.

Dated: June 30, 2008

SIDLEY AUSTIN LLP

By: /s/ Samuel R. Miller

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# **EXHIBIT 1**

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF MISSISSIPPI  
3 SOUTHERN DIVISION

4 NED COMER, ET AL

PLAINTIFFS

5 V.

CIVIL ACTION NO: 1:05CV436-LG-RHW

6 MURPHY OIL, U.S.A., ET AL

DEFENDANTS

7  
8 **TRANSCRIPT OF HEARING ON DEFENDANTS' MOTIONS TO DISMISS**

9  
10 BEFORE HONORABLE LOUIS GUIROLA, JR.  
11 UNITED STATES DISTRICT JUDGE

12  
13 AUGUST 30, 2007  
14 GULFPORT, MISSISSIPPI

15  
16  
17 COURT REPORTER:

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1           **THE COURT:** The matter scheduled this morning is in  
2 cause number 1:05cv436. The case is styled Ned Comer, et al  
3 versus Murphy Oil U.S.A., et al. This matter is scheduled for  
4 an oral argument hearing on a series of motions to dismiss upon  
5 which the Court today will concentrate or will hear argument  
6 regarding one issue and one issue only, and that is the  
7 question of whether or not this Court has the jurisdiction over  
8 the claims made by the plaintiffs. In particular I have asked  
9 the attorneys to focus on the issue of standing and political  
10 question. I am given to understand that on behalf of the  
11 plaintiffs that Mr. Maples, Gerald Maples, you will be speaking  
12 on behalf of the plaintiffs? Is that correct?

13           **MR. MAPLES:** Yes, sir.

14           **THE COURT:** And Mr. Winkelman, you will be speaking  
15 on behalf of the defendants?

16           **MR. WINKELMAN:** Yes, Your Honor.

17           **THE COURT:** I think it would be helpful to the court  
18 reporter, and it would be helpful to me as well, if we went  
19 around the room, starting with you, Mr. Maples, and if we went  
20 around and you would all identify yourselves and identify who  
21 you represent.

22           **MR. MAPLES:** Gerald Maples for the plaintiffs.

23           **MR. WILLIAMSON:** Alex Williamson on behalf of the  
24 plaintiffs.

25           **MR. WILES:** Stephen Wiles representing the

1 into and entered his house. So if all we did is look at those  
2 labels, what the Supreme Court would have found in 1849 was no  
3 political question. It found the opposite because it turned  
4 out that the breakers and enterers said they were authorized to  
5 do so because they were the lawful agents of the properly  
6 constituted government of Rhode Island at a time of martial  
7 law, a fairly important detail. And what the Supreme Court  
8 decided was that to resolve this seemingly simple trespass case  
9 about only damages, it would have to decide issues that only  
10 the Congress can decide. So there is plenty of precedent, Your  
11 Honor, for my earlier point that, unfortunately, semantic  
12 cataloguing, the quote from the Supreme Court, doesn't work.  
13 It doesn't much matter what the labels are in the complaint.  
14 What matters is, what are the issues that have to be  
15 adjudicated. Thank you, Judge.

16 **THE COURT:** Thank you, Mr. Winkelman. I will take a  
17 short recess, and when I return, I will tell you where we are  
18 going to go. Thank you.

19 (RECESS TAKEN AT 10:06 A.M. UNTIL 10:32 A.M.)

20 **THE COURT:** Thank you. Please be seated. One of the  
21 questions that I pondered with some of the staff attorneys  
22 during the recess was just why weren't the plaintiffs able to  
23 find a nondiverse party. Having failed in that responsibility,  
24 the Court will here give it its best shot.

25 I have struggled because it is very easy to be inclined to

1 want to, quote-unquote, do the right thing at all times. And  
2 you have got to weigh that, balance that, with the authority  
3 that you have under Article III and the responsibility you have  
4 to follow the law, or in this case the absence of law.

5 While the plaintiffs argue that this is not a case about  
6 global warming, it really is. It is a case wherein the  
7 plaintiffs have rung a bell that should not come as a surprise  
8 to many of us, anyone who reads the newspaper or watches the  
9 television, anyone who is aware of the science and has taken  
10 any time at all to do some independent research.

11 Let me point out that it is very apparent, Mr. Maples,  
12 while you make your arguments that you and in all likelihood  
13 those that sit with you on that side of the courtroom are  
14 passionate about this issue, and you have a right to be  
15 passionate about it. I think it would be unwise for any of us  
16 as citizens of this planet to ignore the science and to ignore  
17 the signs, if you will, of what we are doing to our planet and  
18 what we are doing to our environment, what we are doing to our  
19 atmosphere, and what legacy we will hand down to our children  
20 and grandchildren. As an individual, I am concerned about  
21 that, but as a judge of this court, I don't have the luxury of  
22 being an individual. I have the responsibility to administer  
23 the law.

24 In this case it seems apparent to the Court, based upon  
25 the arguments of counsel and based upon the very

1 well-articulated arguments that you have made in your brief,  
2 that this Court does not have standing to adjudicate these  
3 issues. These are not injuries which are fairly attributable  
4 to these individual defendants. And while plaintiffs have  
5 argued that we are not -- I am gratified to know I am not a  
6 co-defendant, but I am a responsible person, as all of us are  
7 responsible for the emission of CO<sub>2</sub> and ultimately greenhouse  
8 gases which cause global warming. We are all responsible for  
9 that. But I do not think that under our system of  
10 jurisprudence that is attributable or traceable to these  
11 individual defendants but is instead or are instead injuries  
12 which are attributable to a larger group that are not before  
13 this Court, not only within this nation but outside of our  
14 jurisdictional boundaries as well. In the opinion of the  
15 Court, these plaintiffs do not have standing and this Court  
16 does not have justiciable issues before it.

17 Alternatively, and I think I am going to speak briefly  
18 about the political question issue because it is somewhat  
19 intertwined with the standing question, that question of  
20 whether or not this is a political question. I have done some  
21 independent research that you may not find in the law books  
22 that tends to underscore, if you will, the realization that the  
23 problem is one in which this Court is simply ill-equipped or  
24 unequipped with the power that it has to address these issues.  
25 For example, I am sure that many of you here know that

1 effective as of January of 2007 that the State of California  
2 has enacted its own Global Warming Solutions Act of 2006. This  
3 particular act in California requires the State Air Resources  
4 Board there to adopt regulations that require reporting and  
5 verification of statewide greenhouse gas emissions and to  
6 monitor and to enforce compliance with these programs. The act  
7 also requires the board to determine what the statewide  
8 greenhouse gas emissions levels were in 1990, and to establish  
9 emissions limits that are equivalent to the 1990 levels by the  
10 year 2020. These are, of course, efforts taken on by the  
11 California legislature. Connecticut, Washington, Maine,  
12 Vermont, New York, Pennsylvania, Rhode Island, Maryland, New  
13 Jersey, Oregon, and Massachusetts have all enacted plans that  
14 are similar to the California act. I cite as an example, the  
15 California and Maine acts have enacted what they call the  
16 Climate Change Action Plan that establishes the goal of  
17 reducing emissions to the 1990 levels by the year 2020.  
18 Maryland has set limits on the amount of greenhouse gases that  
19 can be emitted from facilities utilizing coal burning or fired  
20 heat exchangers. New Jersey has required enactment of  
21 regulations requiring monitoring and reporting of greenhouse  
22 gas emissions. Georgia, Alaska, Colorado, Idaho, South  
23 Carolina, and Florida have established advisory committees that  
24 study the effect of global warming and determine measures that  
25 can be taken to mitigate the problem. Nebraska has established

1 a carbon sequestration advisory committee to conduct research  
2 concerning agricultural advances that would reduce greenhouse  
3 emissions. The state of Iowa has enacted statutes that require  
4 the Department of Natural Resources to establish voluntary  
5 greenhouse gas inventory and registry, an energy independence  
6 plan that would decrease reliance on foreign oil, and a climate  
7 change advisory council. New Hampshire has developed a  
8 voluntary greenhouse gas emissions reduction registry as well.  
9 And Virginia has adopted a Commonwealth Energy Policy that will  
10 promote the generation of electricity through technologies that  
11 do not contribute to greenhouse gases and global warming. The  
12 legislatures in Alabama, Illinois, Kentucky, Georgia, Oklahoma,  
13 Wyoming, and West Virginia have all adopted statutes providing  
14 the development of new regulatory programs intended to reduce  
15 greenhouse gases and their emissions are premature absent some  
16 Senate ratification of the Kyoto Protocol. Of course, these  
17 states fear that piecemeal uncoordinated regulations may be  
18 inconsistent with subsequent determinations that are made by  
19 our Congress, and the premature enactment of such regulations  
20 would hurt the economy. Georgia and Oklahoma have, of course,  
21 developed voluntary reduction programs, and Illinois has  
22 enacted the Clean Coal FutureGen Project for Illinois Act which  
23 would develop carbon storage and capture plans for fossil fuel  
24 energy and hydrogen-generating units. The State of Illinois  
25 has a goal of at least five percent of the state's energy



1 production -- use derived from renewable sources or forms of  
2 energy by 2010, and at least 15 percent by 2020.

3 I bring this to your attention, and I think many of you  
4 may already know some of these things, because I think, again,  
5 that underscores the arena in which this debate needs to be  
6 discussed. It is a legitimate debate. It is an important  
7 debate, but it is a debate which simply has no place in the  
8 court, until such time as Congress enacts legislation which  
9 sets appropriate standards by which this Court can measure  
10 conduct, whether it be reasonable or unreasonable, and, more  
11 important, develops standards by which a group of people, we  
12 call them juries, can adjudicate facts and apply the law, these  
13 standards, and judge whether conduct crosses the line between  
14 reasonable and legal conduct and unreasonable or tortious  
15 conduct. Under the circumstances, I think that the plaintiffs  
16 are asking the Court to develop those standards, and it is  
17 something that this Court simply is not empowered to do.

18 This is not a case such as *Massachusetts versus EPA* where  
19 the State of Massachusetts simply wanted to require the  
20 Environmental Protection Agency to, in essence, do its job.  
21 This is not a case in which these defendants, for example, have  
22 done some damage, some attributable damage to the wetlands or  
23 to the floor of the wetlands, which, in essence, has made  
24 damage as a result of hurricanes more likely. Instead, this is  
25 a case in which the plaintiffs directly ask this Court to

1 attribute fault to these defendants under standards that as of  
2 yet do not exist.

3 It is clear from the complaint and clear from the  
4 arguments here today that what you are asking this Court to do  
5 is what *Baker versus Carr* told me not to do, and that is to  
6 balance economic, environmental, foreign policy, and national  
7 security interest and make an initial policy determination of a  
8 kind which is clearly nonjudicial. Adjudication of the  
9 plaintiffs' claims in this case would necessitate the  
10 formulation of standards dictating, for example, the amount of  
11 greenhouse gas emissions that would be excessive and the  
12 scientific and policy reasons behind those standards. These  
13 policy decisions are best left to the executive and to the  
14 legislative branches of the government, who are not only in the  
15 best position to make those decisions but are constitutionally  
16 empowered to do so.

17 Finally, one practical note, and it became very apparent,  
18 Mr. Maples, during your argument, that the preparation and the  
19 discovery involved in a case of this magnitude will take a long  
20 time and will cost both sides millions of dollars. It seems to  
21 me that it would be a much better course of action to take.  
22 And, of course, I am convinced that I am right, but I could be  
23 wrong, but if I am wrong, I can be corrected, and the Court of  
24 Appeals will have no hesitation to correct me and send this  
25 case back, at which time we will conduct the discovery

1 necessary to prepare it for trial. If, on the other hand, I  
2 were to take the other course, which I think would be  
3 incorrect, and that is to permit the case to go forward and  
4 rule against the defendants on the standing issue, I would be  
5 inviting the prospect or the proposition that after spending  
6 millions of dollars and countless hours, man-hours, in  
7 preparation of the case, that it would be reviewed by an  
8 appellate court that would conclude that it was not an issue  
9 that was justiciable by the Court, and ultimately all our work  
10 would be in vain.

11 The defendant's motion to dismiss is granted. In addition  
12 to that, the Court is sua sponte dismissing all of the  
13 remaining defendants. This will place this case in a  
14 procedural posture in which all of the parties, plaintiffs and  
15 defendants, can have this matter reviewed in the event that I  
16 am in error. I will enter that order today. Anything else on  
17 behalf of the movants or the defendants? Any questions?

18 **MR. WINKELMAN:** No, Your Honor. Thank you.

19 **THE COURT:** Mr. Maples, anything else on behalf of  
20 the plaintiffs? I guess, in essence, what I am saying, if I  
21 have no standing as to these defendants, there is no standing  
22 as to any of the defendants.

23 **MR. MAPLES:** Your Honor, may I make one request?

24 **THE COURT:** Yes.

25 **MR. MAPLES:** Would you make clear which version of

1 the complaint is at issue?

2 **THE COURT:** The fourth amended complaint. The fourth  
3 amended complaint is what is on file.

4 **UNKNOWN SPEAKER FROM AUDIENCE:** The fourth amended  
5 complaint is on file or the third amended complaint is on file?

6 **THE COURT:** I'm sorry. The third amended complaint  
7 is on file. There is leave to file a fourth amended complaint,  
8 which, of course, is moot at this point. The third amended  
9 complaint is the one that is before this Court.

10 **MR. MAPLES:** And there is no ruling on the fourth  
11 amended complaint?

12 **THE COURT:** In the event that I am in error and there  
13 is standing, then I will consider whether or not an additional  
14 amended complaint will be allowed.

15 **MR. MAPLES:** Thank you, Your Honor.

16 **THE COURT:** I'm sorry. I took one step. Of course,  
17 all additional motions are rendered moot. I will enter an  
18 order accordingly. If there is nothing else, we are adjourned.

19 (HEARING CONCLUDED.)

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CERTIFICATE OF COURT REPORTER

I, Teri B. Norton, RMR, FCRR, Official Court Reporter for the United States District Court for the Southern District of Mississippi, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings reported by me using the stenotype reporting method in conjunction with computer-aided transcription, and that same is a true and correct transcript to the best of my ability and understanding.

I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

NATIVE VILLAGE OF KIVALINA and	)	Case No. 08-cv-1138-SBA
CITY OF KIVALINA,	)	
	)	Assigned to: Hon. Sandra B. Armstrong
Plaintiffs	)	
	)	<b>[PROPOSED] ORDER GRANTING</b>
vs.	)	<b>UTILITY DEFENDANTS' MOTION TO</b>
	)	<b>DISMISS</b>
	)	
EXXONMOBIL, CORPORATION,	)	
	)	Date: December 9, 2008
Defendants	)	Time: 1:00 p.m.
	)	Place: Courtroom 3, 3 <sup>rd</sup> Floor

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1 The Motion of the Utility Defendants<sup>1</sup> to Dismiss plaintiffs' claims, under Rules 12(b)(1) and  
 2 12(b)(6) of the Federal Rules of Civil Procedure, came on for hearing before this Court on December  
 3 9, 2008. All parties were represented by counsel.

4 Having considered the moving and opposition papers and heard the oral arguments of  
 5 counsel, the Court HEREBY ORDERS that the Utility Defendants' Motion to Dismiss under Rules  
 6 12(b)(1) and 12(b)(6) is GRANTED; and Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

7 In considering a motion to dismiss under Rule 12(b)(1), this Court must determine whether it  
 8 has subject matter jurisdiction, and "may look beyond the complaint to matters of public record"  
 9 when making that determination. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Under Rule  
 10 12(b)(6), this Court must dismiss "where there is no cognizable legal theory or an absence of  
 11 sufficient facts alleged to support a cognizable theory." *Navarro v. Block*, 250 F.3d 729, 732 (9th  
 12 Cir. 2001). While all allegations of fact must be taken as true and all reasonable inferences drawn in  
 13 favor of plaintiffs, the Court need not accept legal conclusions cast as factual allegations. *Clegg v.*  
 14 *Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir.1994). And, while the Court generally may  
 15 not look beyond the complaint when ruling on a Rule 12(b)(6) motion, it may consider matters of  
 16 public record, such as formal pronouncements by agencies and officials. *Barron v. Reich*, 13 F.3d  
 17 1370, 1377 (9th Cir. 1994). These standards mandate dismissal of plaintiffs' claims.

18 This is the fourth lawsuit in which a group of plaintiffs has sued seeking judicial redress for  
 19 injuries allegedly caused by greenhouse gas emissions and global warming. The three earlier  
 20 lawsuits were all dismissed on the pleadings because they inescapably required federal courts to  
 21 usurp the responsibilities of the political branches to decide fundamental questions concerning the  
 22 nation's economy, security, and foreign relations.<sup>2</sup> This lawsuit is materially no different.

23 <sup>1</sup> For purposes of this order, the phrase "utility defendants" refers to American Electric Power  
 24 Company, DTE Energy Corporation, Duke Energy Corporation, Dynegy Holdings, Inc., Edison  
 25 International, MidAmerican Energy Holdings Company, Pinnacle West Capital Corporation, Reliant  
 Energy, Inc., The AES Corporation, The Southern Company and Xcel Energy, Inc.

26 <sup>2</sup> See *California v. Gen. Motors Corp.*, No. 06-5755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007),  
 27 *appeal pending*, No. 07-16908; *Comer Oil v. Murphy Oil USA*, No. 1:05-cv-00436-LG-RHW (S.D.  
 Miss. Aug. 30, 2007), *appeal pending*, No. 07-60756 (5th Cir.) "*Comer Order*"; *Connecticut v.*

(Footnote continued)

**Rule 12(b)(1):** First, plaintiffs’ claims raise non-justiciable political questions. “[T]he presence of a political question precludes a federal court, under Article III of the Constitution, from hearing or deciding the case.” *No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1382 (9th Cir. 1988); *see also Baker v. Carr*, 369 U.S. 186, 217 (1962). Because everyone on the planet emits carbon dioxide, this suit requires the Court to determine that greenhouse gas emissions beyond a certain level and by certain sources should be actionable. As the three other courts that have confronted global warming tort suits have recognized, courts have no “discoverable and manageable standards” for making such initial policy determinations. *Id.*, 217; *see Gen. Motors*, 2007 WL 2726871, at \*6-\*16; *Connecticut*, 406 F. Supp. 2d at 274; *Comer Order* at 39. To hold that defendants’ past emissions were unreasonable, and thus tortious, this Court (or a jury) would have to determine (a) the costs defendants would have incurred if they had fundamentally altered energy production in order to achieve significant greenhouse gas reductions, (b) the economic and other societal consequences that would have resulted from such costs, and (c) the risk that such reductions would have been offset by increased emissions elsewhere. The Court (or jury) would then have to determine that these societal costs and risks were outweighed by the risk of plaintiffs’ alleged global warming-related injuries. The “correct” balance of such broad-gauged and multifaceted societal interests, however, is not a question of fact for this Court or a jury to decide. Rather, such issues of “high policy” must be resolved “within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives.” *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 647 (1981) (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)). *See Gen. Motors*, 2007 WL 2726871 at \*14 (finding “Plaintiff’s federal common law global warming nuisance tort would

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*American Elec. Power Co., Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *appeal pending*, Nos. 05-5104-cv & 05-5119-cv (2nd Cir.).

1 have an inextricable effect on interstate commerce and foreign policy – issues constitutionally  
2 committed to the political branches of government.”)

3 Second, plaintiffs lack standing. To have Article III standing, plaintiffs must have suffered  
4 an injury-in-fact that was caused by defendants and is redressable by this Court. *Lujan v. Defenders*  
5 *of Wildlife*, 504 U.S. 555, 560 (1992). Because this Court is presumed to lack Article III  
6 jurisdiction, plaintiffs had to plead facts sufficient to establish each of these indispensable elements.  
7 *Kokonnen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). “It is not . . . proper to  
8 assume that [plaintiffs] can prove facts that [they] ha[ve] not alleged,” and mere “labels and  
9 conclusions, [or] a formulaic recitation of the elements of a cause of action will not do.” *Bell*  
10 *Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65, 1969 n.8 (citation and internal quotation marks  
11 omitted) (2007).

12 Here, plaintiffs do not and cannot allege that their claimed injuries—*i.e.*, storm damage and  
13 erosion from a loss of Arctic sea ice that formerly protected their island—are fairly traceable to these  
14 particular defendants. In fact, plaintiffs’ allegations contradict such a claim. According to the  
15 complaint, plaintiffs’ injuries are not attributable to the select group of companies they have sued,  
16 but to a homogeneous aggregation of countless worldwide emissions dating back decades and  
17 possibly centuries. For these very reasons, the *Comer* court dismissed a similar complaint for lack of  
18 standing, ruling that the plaintiffs’ injuries were not “fairly attributable” to many of the same  
19 defendants that plaintiffs have sued here. *Comer Order* at 36. The court noted that everyone on the  
20 planet was responsible to some degree “for the emission of [carbon dioxide] and ultimately  
21 greenhouse gases which cause global warming.” *Id.* The injuries asserted by plaintiffs in that case,  
22 therefore, were not “traceable to these individual defendants but . . . instead . . . are attributable to a  
23 larger group that [is] not before this Court, not only within this nation but outside of our  
24 jurisdictional boundaries as well.” *Id.* Here, too, plaintiffs’ own allegations make clear that their  
25 alleged injuries are not fairly traceable to these defendants, but to countless entities around the globe.  
26 *See also Tex. Indep. Producers & Royalty Owners Ass’n v. EPA*, 410 F.3d 964, 974 (7th Cir. 2005)  
27 (failure to account for pollution attributable to others precluded traceability to one industry’s  
28

discharges). Boilerplate recitations that defendants' emissions "are a direct and proximate contributing cause of" plaintiffs' injuries, Compl. ¶ 251, cannot mask this fatal defect.

Additionally, plaintiffs' injuries are simply too remote from the conduct of these defendants to be fairly traceable. *See In re African-American Slave Descendants Litig.*, 471 F.3d 754, 761 (7<sup>th</sup> Cir. 2006), *cert. denied*, 128 S. Ct. 92 (2007) (remoteness is "a limitation on Article III standing"). Injuries are too remote to establish Article III causation when they can be connected to the alleged wrongful conduct only by multiple links in an attenuated chain of causation. *See, e.g., Camden County Bd. of Chosen Freeholders v. Baretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 257 (D.N.J. 2000), *aff'd*, 273 F.3d 536 (3d Cir. 2001). Here, the asserted causal chain between the carbon dioxide emissions from defendants' operations and plaintiffs' alleged injuries involves far too many attenuated links to establish Article III causation. *See In re African-Am. Slave Descendants Litig.*, 471 F.3d at 759 (affirming dismissal where causal chain was "too long and ha[d] too many weak links for a court to be able to find that the defendants' conduct harmed the plaintiffs at all"); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 541 (3d Cir. 2001) (causal chain with seven links was "too attenuated to attribute sufficient control to the manufacturers to make out a public nuisance claim").

**Rule 12(b)(6):** Although the complaint is properly dismissed for lack of jurisdiction under Rule 12(b)(6), the Court deems it appropriate to dismiss the claims provisionally under Rule 12(b)(6) as well.

**Federal Claims:** Plaintiffs' federal claim also fails as a matter of law. First, plaintiffs lack a federal cause of action. The federal common law cause of action the Supreme Court created a century ago for transborder pollution permitted *States* to seek *injunctive relief* for nuisances of "simple type"—*i.e.*, those where immediately harmful or noxious substances cause severe localized harms directly traceable to an identifiable out-of-state source. *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923) (it was only "a public nuisance of *simple type* for which a *state* may properly ask an injunction")(emphasis added); *Illinois v. Milwaukee*, 406 U.S. 91, 106 n.8 (1972) ("*Milwaukee I*") (same). Plaintiffs cannot wedge their claims into this mold. They are not States and they do seek

1 damages, not injunctive relief. *Middlesex County Sewerage Authority v. National Sea Clammers*  
 2 *Ass’n*, 453 U.S. 1, 10 (1983) (a federal nuisance claim for damages by a private party would go  
 3 “considerably beyond [*Milwaukee I*], which involved purely *prospective relief* by a *state*”(emphasis  
 4 added); *see also Gen. Motors*, 2007 WL 2726871 at \*15 (noting that the Court’s cases all involved  
 5 claims for equitable relief). Moreover, the novel and complex nuisance they allege differs in every  
 6 material respect from those of “simple type.” The emissions at issue are not immediately harmful or  
 7 noxious, and global warming is alleged to cause planet-wide harms, none of which is directly  
 8 traceable to any source.

9 Nor can this Court expand the previously recognized cause of action to encompass plaintiffs’  
 10 extraordinary claim. Doing so would contravene the Supreme Court’s repeated admonitions that  
 11 courts cannot use their limited federal common lawmaking powers to create private damages actions  
 12 or to resolve issues of high policy. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001); *Stoneridge*  
 13 *Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008) (refusing to expand right of  
 14 action implied from federal securities laws); *Central Bank of Denver, N.A. v. First Interstate Bank of*  
 15 *Denver, N.A.*, 511 U.S. 164 (1994) (same); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) (“a  
 16 decision to create a private right of action . . . is one better left to legislative judgment in the great  
 17 majority of cases.”).

18 Furthermore, any expanded version of the federal common law cause of action that could  
 19 encompass plaintiffs’ claim has been displaced. “[I]t is for Congress, not federal courts to articulate  
 20 the appropriate standards to be applied as a matter of federal law,” and courts should adopt a  
 21 “willingness to find congressional displacement of federal common law” whenever “Congress  
 22 addresses [a] problem formerly governed by federal common law.” *City of Milwaukee v. Illinois*,  
 23 451 U.S. 304, 317 & n.9, 315 n.8 (1981) (“*Milwaukee II*”) (emphasis added and deleted); *see also*  
 24 *Nat’l Audubon Soc. v. Dep’t of Water*, 869 F.2d 1196, 1201 (9th Cir. 1988); *United States v. Oswego*  
 25 *Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981) (“separation of powers concerns create a presumption  
 26 in favor of [displacement] of federal common law whenever . . . Congress has legislated on the  
 27 subject”) (emphasis added). Under *Milwaukee II*, “once Congress has addressed a national concern,  
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1 our fundamental commitment to the separation of powers precludes the courts from scrutinizing the  
2 sufficiency of the congressional solution” or “holding that the solution Congress chose is not  
3 adequate.” *Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982). Congress has  
4 spoken directly to the subject of global warming through a series of laws that adopt a carefully  
5 calibrated mix of regulation, research, technology development incentives and multilateral  
6 negotiations.

7 In addition, a recognition of the damages action plaintiffs seek would effectively create *de*  
8 *facto* emissions limits and would thus interfere with the President’s implementation of U.S. foreign  
9 policy, which seeks to use the prospect of mandatory U.S. emissions limits as a means of obtaining  
10 comparable commitments from developing countries, such as China. Accordingly, the federal  
11 common law cause of action cannot be expanded to encompass plaintiffs’ novel claims, because a  
12 “global warming nuisance tort would have an inextricable effect on . . . foreign policy.” *Gen.*  
13 *Motors*, 2007 WL 2726871 at \*13, \*14; *see also Connecticut*, 406 F. Supp. 2d at 272-73 (federal  
14 common law nuisance claim to address global warming would require court to “determine and  
15 balance the implications of such relief on the United States’ ongoing negotiations with other  
16 nations”).

17 Finally, even if a federal claim did exist, it would be time-barred. Where the “untimeliness is  
18 apparent on the face of the liberally construed complaint,” the suit must be dismissed. *Soliman v.*  
19 *Philip Morris Inc.*, 311 F.3d 966, 971 (9th Cir. 2002). Plaintiffs’ allegations and the documents they  
20 incorporate in their complaint show that they were aware of the factual basis of their claims no later  
21 than December 2003. Because they waited until February 2008 to bring this suit, their claims are  
22 barred by California’s three-year statute of limitations, under the “borrowing” rule that applies when  
23 Congress fails to provide a limitations period for a statutory cause of action. *Barajas v. Bermudez*,  
24 43 F.3d 1251, 1255 (9th Cir. 1994); *see also N. Star Steel Co. v. Thomas*, 515 U.S. 29, 35 (1995).



1 California requires an “action for trespass upon or injury to real property” to be brought within  
 2 “three years.” CAL. CIV. PROC. CODE § 338(b).<sup>3</sup>

3 ***State Law Claims:*** Insofar as this order provisionally disposes of the federal claims on non-  
 4 jurisdictional grounds, the Court chooses to retain its “discretion to adjudicate the remaining [state-  
 5 law] claims.” *Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 806 (9th Cir. 2001),  
 6 because the defects that doom plaintiffs’ state-law claims are so closely related to the issues that  
 7 mandate dismissal off their federal claim. Accordingly, having invested significant resources in  
 8 evaluating and addressing the federal claim, this Court will exercise its discretion in the interests of  
 9 convenience, fairness and judicial economy to address and dispose of the related state-law counts as  
 10 well.

11 Plaintiffs’ state law claims must be dismissed because they are preempted by the same  
 12 federal laws and foreign policy efforts that displace plaintiffs’ purported federal common law claim.  
 13 Massive state-law damage awards would frustrate and conflict with Congress’s method of  
 14 addressing climate change. Congress has ordered a careful phasing-in of one type of emissions cap  
 15 (for automobiles), conferred authority on an expert and politically accountable agency to determine  
 16 whether to regulate greenhouse gas emissions, and has repeatedly confirmed that climate change  
 17 must be addressed on a comprehensive, national basis, that includes negotiations with other nations.  
 18 *See Public Utility District No. 1 of Gray’s Harbor County Washington v. Idacorp Inc.*, 379 F.3d 641,  
 19 649-50 (9th Cir. 2004) (quoting *Gadda v. Ashcroft*, 363 F.3d 861, 871 (9th Cir. 2004) (“‘conflict  
 20 preemption’ exists ‘if there is an actual conflict between federal and state law or where compliance  
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22 <sup>3</sup> Nor is either plaintiff exempt from statutes of limitations by virtue of its status. The City of  
 23 Kivalina is a municipality, not a State, and thus is subject to statutes of limitations to the same extent  
 24 as a private party. *See Guar. Trust Co. of N.Y. v. United States*, 304 U.S. 126, 135 n.3 (1938); *San*  
 25 *Marcos Water Dist. v. San Marcos Unified Sch. Dist.*, 190 Cal. App. 3d 1083, 1087 (Ct. App. 1987).  
 26 Finally, although California Civil Code § 3490 provides that “[n]o lapse of time can legalize a public  
 27 nuisance,” that provision applies only to “action[s] brought by a public entity to *abate* a public  
 28 nuisance,” not to damages suits like this one. *Mangini v. Aerojet-Gen. Corp.*, 230 Cal. App. 3d  
 1125, 1142-43 (Ct. App. 1991) (emphasis added); *Beck Dev. Co. v. S. Pac. Transp. Co.*, 44 Cal.  
 App. 4th 1160, 1216 (Ct. App. 1996); *see also* Donald G. Gifford, *Public Nuisance as a Mass*  
*Products Liability Tort*, 71 U. Cin. L. Rev. 741, 781-82 (2003).



with both is impossible’”); *see also BMW, Inc. v. Gore*, 517 U.S. 559, 585 (1996) (no state may use tort system “as a means of imposing its regulatory policies on the entire Nation”). Global climate change is predominantly a matter of federal concern and cannot be addressed in any meaningful manner by varied state law mandates. In addition, state-law damage awards conflict with the President’s implementation of U.S. foreign policy.

Further, plaintiffs have not and cannot allege key elements to make out a cognizable nuisance claim. For the same reasons that plaintiffs’ allegations fail to establish standing, those allegations do not and cannot establish proximate causation, *see Assoc. of Washington Public Hosp. Districts v. Philip Morris Inc.*, 241 F.3d 696, 706 (9th Cir. 2001) (dismissing common law claims, including nuisance, for lack of proximate cause); *Martinez v. Pac. Bell*, 225 Cal. App. 3d 1557, 1565-1566 (Cal. Ct App. 1990) (nuisance liability extends only to damage proximately caused by defendant’s conduct). For the same reasons that their purported federal common law claim is nonjusticiable, plaintiffs cannot show a breach of any legally cognizable duty. And plaintiffs have failed to allege a unique injury. *See In re Exxon Valdez*, No. A89-0095-CV (HRH), 1994 WL 182856 at \*2 (D. Alaska March 23, 1994) (“[t]he Alaska Natives do not have a viable, maritime, public nuisance claim, as their claim is only different in degree, but not in kind, from that suffered by the general population of Alaska”).

They likewise cannot state an independent concert-of-action claim. Properly understood, concert of action merely describes two theories of secondary liability—conspiracy and aiding and abetting. *See Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983). Concert of action thus is not an independent tort. It is, at most, a basis for imposing liability on someone other than the primary tortfeasor. *See Eastern Trading Co. v. Refco, Inc.*, 229 F.3d 617 (7th Cir. 2000) (“there is no tort of aiding and abetting”; rather, it is “a basis for imposing tort liability”); *Halberstam*, 705 F.2d at 479 (“[s]ince liability for civil conspiracy depends on performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort.”); *Cadlo v. Owens-Illinois, Inc.*, 23 Cal. Rptr. 3d 1, 6 (Cal. Ct. App. 2004) (“[c]oncert of action is a theory of group liability.”). Because plaintiffs cannot assert

1 an actionable, underlying tort, their concert-of-action claim cannot survive. *See, e.g., Wynn v. Nat'l*  
2 *Broad. Co., Inc.*, 234 F. Supp. 2d 1067, 1114 (C.D. Cal. 2002) (dismissing aiding-and-abetting claim  
3 where complaint failed to establish an underlying tort). Furthermore, in light of *Twombly*,  
4 allegations that defendants “knowingly, and willfully agreed and conspired” to engage in fraud,  
5 without any “facts supporting the existence of an agreement,” are insufficient to state a claim for  
6 conspiracy under Rule 8(a) notice pleading standards. *Impac Warehouse Lending Group v. Credit*  
7 *Suisse First Boston, LLC*, No. 06-56024, 2008 WL 731050, at \*1 (9th Cir. 2008). A boilerplate  
8 recitation of the elements identified by the Restatement is not sufficient.

9 Finally, and for the same reasons discussed with respect to the federal claims, plaintiff’s state  
10 law claims are time-barred by California’s three year statute of limitations.

11 For all of the foregoing reasons, the Utility Defendants’ Motion to Dismiss is GRANTED.  
12 Because leave to amend would here be futile, *Schreiber Distributing Co. v. Serv-Well Furniture Co.,*  
13 *Inc.*, 806 F. 2d 1393, 1401 (9th Cir. 1986), *Albrecht v. Lund*, 845 F. 2d 193, 195-96 (9th Cir. 1988),  
14 Plaintiff’s Complaint is DISMISSED WITH PREJUDICE.

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16 IT IS SO ORDERED.

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18 DATED: December \_\_, 2008

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19 Honorable Sandra B. Armstrong  
United States District Judge  
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